

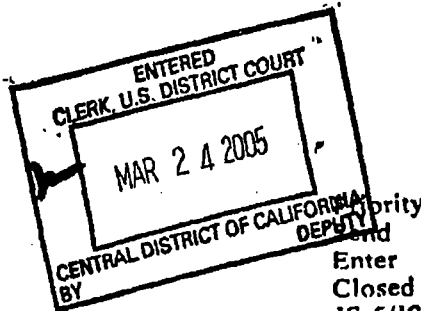
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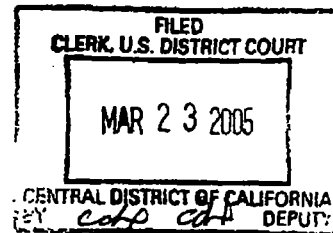
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THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

18 CITY OF SAN BERNARDINO,)
19 Plaintiff,)
20 v.)

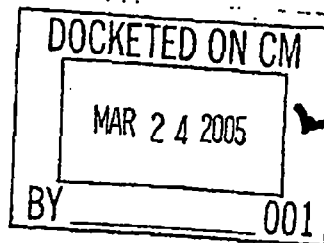
CIVIL ACTIONS NOS.
CV 96-8867(MRP) ☒
CV 96-5205 (MRP) ☒
Consolidated

21 UNITED STATES OF AMERICA,)
22 Defendant.)

23 STATE OF CALIFORNIA, on behalf)
24 of the DEPARTMENT OF TOXIC)
25 SUBSTANCES CONTROL,)
26 Plaintiff,)

CONSENT DECREE

27 v.)
28 UNITED STATES OF AMERICA,)
Defendant.)



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1 I. BACKGROUND

2 A. The State of California ("State"), on behalf of the Department of Toxic
3 Substances Control ("DTSC"), and the City of San Bernardino ("City") filed complaints against
4 the United States, Department of the Army ("Army") in 1996, pursuant to, inter alia, Section 107
5 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),
6 42 U.S.C. § 9607. DTSC and the City in their complaints seek, inter alia, reimbursement of costs
7 incurred and to be incurred at the Newmark Groundwater Contamination Superfund Site,
8 together with accrued interest. DTSC also seeks natural resource damages for resources under
9 the trusteeship of DTSC. In their complaints, later consolidated by the Court, DTSC and the City
10 alleged that the Army's World War II-era operations at the former San Bernardino Engineering
11 Depot, commonly referred to as the former "Camp Ono," a Formerly Used Defense Site located
12 in San Bernardino, California, caused or contributed to the groundwater contamination at the
13 Newmark Groundwater Contamination Superfund Site. The groundwater is principally
14 contaminated with tetrachloroethylene (also known as perchloroethylene or "PCE"),
15 trichloroethylene ("TCE"), and Freon 11 and 12. The actions filed by DTSC and the City have
16 been stayed by this Court by orders dated December 23, 1999, October 12, 2000, May 24, 2001,
17 November 26, 2001, July 30, 2002, March 21, 2003 and October 7, 2003 to enable these parties
18 to resolve their claims pursuant to this Consent Decree. DTSC's case is styled *State of*
19 *California, on behalf of the Department of Toxic Substances Control v. United States, et al., CV*
20 *96-5205 (MRP)*, and the City's case is styled *City of San Bernardino, Municipal Water*
21 *Department v. United States, et al., CV 96-8867 (MRP)*.
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26 B. The United States of America ("United States"), on behalf of the Administrator of
27 the United States Environmental Protection Agency ("EPA"), alleges that it has claims against
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1 the City, which claims could be asserted in this or another action as direct claims, counterclaims
2 or otherwise. The claims on behalf of EPA include claims for: (1) reimbursement of costs
3 incurred or to be incurred by EPA for interim response actions at the Newmark Groundwater
4 Contamination Superfund Site, Newmark Operable Unit and Muscoy Operable Unit,
5 (respectively, "Newmark OU" and "Muscoy OU" and collectively "the Site") in San Bernardino,
6 California, together with accrued interest; and (2) performance of studies and response work at
7 the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended)
8 ("NCP"). The United States' claims also include a claim for performance of certain response
9 work at the Source Control Operable Unit ("Source Control OU") and otherwise in connection
10 with the Newmark Groundwater Contamination Superfund Site. The Parties agree that the
11 United States on behalf of EPA is an appropriate party plaintiff pursuant to Fed. R. Civ. P. 19
12 and 24.

15 C. The City denies the allegations advanced against it on behalf of the Army in this
16 litigation and the allegations that could be advanced against it in a counterclaim or otherwise on
17 behalf of EPA as set forth in Paragraph B. The United States has denied the allegations of the
18 City's and DTSC's complaints. The parties to this Consent Decree ("Parties") do not admit any
19 liability arising out of the transactions or occurrences alleged in the complaints.

21 EPA Response Actions

22 D. On June 9, 2000, in accordance with the NCP and Section 121(f)(1)(F) of
23 CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State, the City, the Army and other
24 parties regarding implementation of the interim remedial actions at the Newmark OU and the
25 Muscoy OU and invited these parties to participate in negotiations to resolve their respective
26 claims.
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1 E. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C.
2 § 9621(f)(1)(F), EPA notified the Department of the Interior on October 22, 2001, and the
3 California Resources Agency, the California Department of Fish and Game, the California State
4 Water Resources Control Board and the California Environmental Protection Agency on
5 October 24, 2001, of these negotiations regarding the release of hazardous substances that may
6 have resulted in injury to natural resources under federal or State trusteeship and encouraged the
7 trustees to participate in the negotiation of this Consent Decree.
8

9 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the
10 Newmark Groundwater Contamination Superfund Site on the National Priorities List ("NPL"),
11 set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on March 31,
12 1989, 54 Fed. Reg. 13296, 13301.
13

14 G. In response to a release or a substantial threat of a release of a hazardous
15 substance(s) at or from the Newmark Groundwater Contamination Superfund Site, EPA
16 commenced a Remedial Investigation ("RI") focusing on the Newmark OU in late 1990. EPA
17 expanded the RI to include the Muscoy OU in September 1992.
18

19 H. EPA completed the RI and Feasibility Study ("RI/FS") pursuant to 40 C.F.R.
20 § 300.430, for the Newmark OU in March 1993 and the RI/FS for the Muscoy OU in December
21 1994.
22

23 I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of
24 the completion of the FS and of the Proposed Plan for interim remedial action at the Newmark
25 OU in March 1993 in the form of a fact sheet distributed to all persons on EPA's mailing list for
26 the Newmark Superfund Site. EPA also issued a press release on March 17, 1993 to announce
27 the release of the Proposed Plan to the public and published notice of the availability of the
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1 Proposed Plan and of a public meeting in the San Bernardino Sun on March 18, 1993. EPA
2 provided an opportunity for written and oral comments from the public on the Proposed Plan for
3 interim remedial action at the Newmark OU. EPA extended the initial 30-day (thirty-day) notice
4 period by 45 (forty-five) days in response to requests from members of the public. The public
5 comment period closed on May 5, 1993. A copy of the transcript of the public meeting on
6 April 14, 1993 is available to the public as part of the administrative record upon which the
7 Regional Administrator based the selection of the interim remedial action at the Newmark OU.
8

9 J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of
10 the completion of the FS and of the Proposed Plan for interim remedial action at the Muscoy OU.
11 in December 1994 in the form of a fact sheet distributed to all persons on EPA's mailing list for
12 the Newmark Superfund Site. EPA also issued a press release on December 16, 1994 to
13 announce the release of the Proposed Plan to the public and published notice of the availability of
14 the Proposed Plan and of a public meeting in the San Bernardino Sun on December 14, 1994.
15 EPA provided an opportunity for written and oral comments from the public on the Proposed
16 Plan for interim remedial action at the Muscoy OU. EPA extended the initial 30-day (thirty-day)
17 notice period to more than five weeks to accommodate the holiday season; no requests for
18 extensions were received from the public. The public comment period closed on January 29,
19 1995. A copy of the transcript of the public meeting on January 20, 1995 is available to the
20 public as part of the administrative record upon which the Regional Administrator based the
21 selection of the interim remedial action at the Muscoy OU.
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25 K. The decisions by EPA on the interim remedial actions to be implemented at the
26 Site are embodied in the Newmark OU Record of Decision ("Newmark ROD"), executed on
27 August 4, 1993, and in the Muscoy OU ROD ("Muscoy ROD"), executed on March 24, 1995
28

1 (collectively, "Interim Remedial Actions"), on both of which the State had a reasonable
2 opportunity to review and comment and on which the State has given its concurrence. The
3 Newmark and Muscoy RODs include EPA's explanation for any significant differences between
4 the RODs and the Proposed Plans as well as a responsiveness summary relating to the public
5 comments. Notices of the final plans were published in accordance with Section 117(b) of
6 CERCLA. The Newmark ROD requires extraction of contaminated groundwater from the
7 Newmark OU, treatment of the contaminated groundwater to meet all State and federal
8 requirements for drinking water, and delivery of the treated groundwater to the City for
9 distribution to the public through its potable water supply system, or in the alternative, recharge
10 to the aquifer. The Muscoy ROD requires extraction of contaminated groundwater from the
11 Muscoy OU, treatment of the contaminated groundwater to meet all State and federal
12 requirements for drinking water, and delivery of the treated groundwater to the City for
13 distribution to the public through its potable water supply system, or in the alternative, recharge
14 to the aquifer. Construction of the Newmark OU extraction and treatment system was completed
15 in October, 1998. Construction of the Muscoy OU extraction and treatment system is anticipated
16 to be complete in 2004.

20 L. Pursuant to Section 104(c) of CERCLA, 42 U.S.C. § 9604(c), EPA and DTSC
21 have entered into State Superfund Contracts ("SSC's") for the Newmark and Muscoy OUs.
22 Under the SSC's, EPA provides ninety per cent (90%) of the funding necessary for
23 implementation of the Interim Remedial Actions and the first ten years of operation and
24 maintenance ("O&M") for the Newmark and Muscoy OUs and DTSC provides ten per cent
25 (10%) of those costs. On September 18, 1995, EPA and the City entered into a Cooperative
26 Agreement for the City to perform certain construction activities and the O&M for the Newmark
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1 OU. The City currently performs O&M on the Newmark OU extraction and treatment system
2 and accepts the treated groundwater, which complies with applicable federal and State standards
3 and permit limits, into its potable water supply system. The costs incurred by the City to
4 implement the work under the Cooperative Agreement have been paid by EPA (90%) and DTSC
5 (10%). On August 6, 1996, the Cooperative Agreement was amended to include the City's
6 performance of certain aspects of the Interim Remedial Action for the Muscoy OU, i.e.,
7 construction of the Muscoy OU extraction system, performance of the O&M on the Muscoy
8 extraction and treatment system, and acceptance of the treated water, which complies with
9 applicable federal and state standards and permit limits, from the Muscoy treatment system. The
10 Muscoy OU is currently in the remedial design and construction phase. EPA currently performs
11 the lead oversight function for the Site. The City has performed its work under the Cooperative
12 Agreement under the oversight of EPA's assigned Remedial Project Manager.

13
14
15 M. The City is a charter City under California law. As part of its duties and powers,
16 its Municipal Water Department and its predecessors supply water to its residents. Pursuant to
17 California law, the City is empowered to enact ordinances to protect the quality of underground
18 water.
19

20 N. EPA has published notice of a proposed Explanation of Significant Differences
21 ("ESD") in a local newspaper of general circulation and sought public comment on the proposed
22 ESD. The ESD is attached as Appendix I to this Consent Decree. The ESD provides for the
23 imposition of institutional controls to assure that the Newmark and Muscoy treatment systems
24 remain effective in meeting the objectives of inhibiting the migration of groundwater
25 contamination into clean portions of the aquifer. The institutional controls to be imposed
26 pursuant to the ESD are to protect the barrier well system established pursuant to the Newmark
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1 and Muscoy RODs, and are an essential and integral component of the interim remedies for the
2 Newmark and Muscoy OUs. Pursuant to the ESD, the City will adopt an ordinance requiring that
3 the installation of new wells that might impact the barrier wells be conducted pursuant to a
4 permit and that the applicant for any such permit demonstrate that the operations of the new well
5 will not contribute to the migration of contaminants past the barrier wells into the
6 uncontaminated portions of the aquifer.

8 O. In addition to the Newmark and Muscoy OUs, EPA has initiated a Source Control
9 OU RI/FS for the Newmark Groundwater Contamination Superfund Site. To determine the
10 sources of the contamination, the U.S. Army Corps of Engineers ("USACE"), on behalf of the
11 Army, and the City have performed substantial field investigation and the Army and the City
12 have thereby incurred response costs. These investigations have included installing groundwater
13 monitoring wells, soil gas sampling, soil sampling and geophysical surveys. EPA expects the
14 Source Control OU RI/FS to help EPA determine, among other things, whether there will be
15 further remedial action required for the Newmark Groundwater Contamination Superfund Site,
16 beyond what is presently required by the Newmark and Muscoy OU RODs, the ESD and this
17 Consent Decree.

20 DTSC and City Response Actions

21 P. In 1980, the California Department of Health Services ("DOHS") sampled water
22 produced from certain City wells and detected contamination from chlorinated volatile organic
23 compounds, including PCE, TCE, freon, decomposition byproducts from those compounds, and
24 other contaminants. As a result of the DOHS sampling, contaminated wells were found in the
25 City's Newmark wellfield. Also as a result of the DOHS sampling in 1980, a second area of
26 contaminated wells was located in the western portion of the City. This contaminated
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1 groundwater became known as the Muscoy plume.

2 Q. The California Department of Health Services (which subsequently became
3 DTSC) found that the Newmark and Muscoy plumes constituted an ongoing release of hazardous
4 substances and an emergency threatening public health and the environment. On November 17,
5 1986, the California Department of Health Services issued a Determination of Imminent and
6 Substantial Endangerment in the matter of North San Bernardino, Muscoy Hazardous Substance
7 Release Site, which formed part of the legal basis for emergency action by the City and DTSC to
8 undertake wellhead treatment of the water produced from the Newmark well field.
9

10 R. On October 30, 1986, DTSC contracted with the City to construct, operate and
11 maintain four treatment systems located at the Newmark wellfield and elsewhere, and DTSC and
12 its assigned remedial project manager directed and oversaw the City's work on the design,
13 construction, operation and maintenance of those treatment systems. DTSC paid for the design
14 and construction of four treatment systems and appurtenant facilities at the Newmark wellfield.
15 The City has paid for, and continues to pay for, the operation and maintenance of these treatment
16 systems and the City paid for and constructed appurtenant storage and distribution facilities
17 needed to accommodate these treatment systems.
18

19
20 Consent Decree Response Actions

21 S. Subject to the City's and EPA's reservations of rights concerning the Cooperative
22 Agreement, this Consent Decree supersedes the SSC's and the Cooperative Agreement for the
23 Newmark and Muscoy OUs, and provides, *inter alia*, for the City to perform the O&M on the
24 Newmark OU and Muscoy OU extraction and treatment systems and Newmark Groundwater
25 Contamination Superfund Site-wide Monitoring, and for the City to accept the treated water from
26 the Newmark and Muscoy OUs into the City's potable water supply, provided that the treated
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1 water meets State and federal permit limits and other regulatory requirements.

2 T. EPA and the City intend to work cooperatively to update, maintain and improve
3 the Groundwater Model developed by EPA in connection with the Newmark and Muscoy OU
4 RI/FS's. The Parties anticipate that the Groundwater Model will provide a valuable tool for
5 analyzing and deciding how to address the effect of other groundwater extraction, surface water
6 spreading, or similar systems that may affect the integrity and effectiveness of the Newmark and
7 Muscoy Operable Units extraction and treatment systems.

8 U. Based on the information presently available, EPA believes that the Work (as
9 defined below) will be properly and promptly conducted by the City if conducted in accordance
10 with the requirements of this Consent Decree and its appendices.

11 V. Solely for the purposes of Section 113(j) of CERCLA, the Interim Remedial
12 Actions selected by the Newmark and Muscoy OU RODs and the Work to be performed shall
13 constitute a response action taken or ordered by the President.

14 W. The Parties recognize, and the Court by entering this Consent Decree finds, that
15 this Consent Decree has been negotiated by the Parties in good faith and implementation of this
16 Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated
17 litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public
18 interest.

19 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

20 II. JURISDICTION

21 1. This Court has jurisdiction over the subject matter of this action pursuant to 28
22 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has
23 personal jurisdiction over the Parties.

1 a. Solely for the purposes of this Consent Decree and the underlying complaints,
2 the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to
3 venue in this District. The City and DTSC shall not challenge the terms of this Consent Decree
4 or this Court's jurisdiction to enter and enforce this Consent Decree.
5

6 b. The Court finds that institutional controls are an integral component of the
7 interim remedies to be implemented at this Site. The Parties have determined to implement the
8 institutional controls through a groundwater management and permit program described in
9 Paragraphs 27-30 of this Consent Decree. Accordingly, the Court finds that it has jurisdiction
10 over any challenge to the groundwater management and permit program to be implemented by
11 the City under Paragraphs 27-30. The Court further finds that any challenge to the groundwater
12 management and permit program or to a permit decision meets the requirements for removal
13 under 28 U.S.C. § 1441, and shall be removable to this Court by any of the United States, DTSC
14 or the City, or by officers of any of these entities acting in their official capacities to implement
15 and defend the interim remedies at this Site. The Parties shall cooperate with each other in the
16 defense of the Interim Remedial Actions, permit decisions at this Site, and the groundwater
17 management and permit program.
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20 III. PARTIES BOUND

21 2. This Consent Decree applies to and is binding upon DTSC and the City, and their
22 successors, agents and assigns, and upon the United States. Any change in ownership, corporate
23 or governmental status of the Parties including, but not limited to, any transfer of assets or real or
24 personal property, shall in no way alter the Parties' responsibilities under this Consent Decree.
25

26 3. The City shall provide a copy of this Consent Decree to each contractor hired to
27 perform the Work (as defined below) required by this Consent Decree and to each person
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1 representing the City with respect to the Site or the Work and shall condition all contracts entered
2 into hereunder upon performance of the Work in conformity with the terms of this Consent
3 Decree. The City or its contractors shall provide written notice of this Consent Decree to all
4 subcontractors hired to perform any portion of the Work required by this Consent Decree. The
5 City shall nonetheless be responsible for ensuring that its contractors and subcontractors perform
6 the Work contemplated herein in accordance with this Consent Decree. With regard to the
7 activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be
8 deemed to be in a contractual relationship with the Party for whom it performs any portion of the
9 Work within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).
10

11 IV. DEFINITIONS

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13 4. Unless otherwise expressly provided herein, terms used in this Consent Decree
14 that are defined in CERCLA or in regulations promulgated under CERCLA shall have the
15 meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are
16 used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the
17 following definitions shall apply:
18

19 "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and
20 Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

21 "City" or "City of San Bernardino" shall mean the City of San Bernardino, California,
22 including any of its divisions, departments, agencies or other subdivisions, and any successors
23 thereto.
24

25 "City Future Response Costs" shall mean costs incurred by the City after the date of
26 funding the O&M and Construction Escrows, subject to the City's reservation of rights
27 (including rights regarding the Cooperative Agreement), through the earliest of the following
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1 dates, as may be applicable to the work in question:

2 a. Final Certification of Completion under Paragraph 57.d or Final Notice of
3 Completion under Paragraph 57.e;

4 b. With respect to the Newmark OU treatment system, including O&M, and any
5 other costs associated with the Newmark OU treatment system, fifty years after October 1, 2000,
6 the date that the Newmark OU treatment system was determined by EPA to be operational and
7 functional pursuant to 40 C.F.R. § 300.435(f)(2);

8 c. With respect to the Muscoy OU treatment system, including O&M, and any
9 other costs associated with the Muscoy OU treatment system, 50 (fifty) years after the Muscoy
10 OU treatment system is determined by EPA to be operational and functional pursuant to 40
11 C.F.R. § 300.435(f)(2);

12 d. With respect to costs for additional treatment capacity constructed to address
13 the Newmark Groundwater Contamination Superfund Site contamination, 50 (fifty) years after
14 entry of this Consent Decree;

15 e. With respect to costs for Site-wide Monitoring to be performed pursuant to this
16 Consent Decree, 50 (fifty) years after the Muscoy OU treatment system is determined by EPA to
17 be operational and functional pursuant to 40 C.F.R. § 300.435(f)(2); or

18 f. With respect to costs associated with the DTSC/City treatment systems, system,
19 fifty years after the date of entry of this Consent Decree.

20 Such costs shall include but shall not be limited to: (1) any differential due to the change in
21 location of City wells to accommodate the Site treatment systems; (2) the cost of power incurred
22 due to the requirement that the Site treatment systems be operated on a 24/7 or other schedule
23 that differs from the schedule dictated by the City's production needs; (3) the cost of land used
24

1 for the Site treatment systems and appurtenances; (4) the cost of comprehensive general liability
2 and property damage insurance related to the Site; (5) the cost of permits required for the Site,
3 including, but not limited to, permits required by the Department of Health Services, the Air
4 Quality Management District, the Regional Water Quality Control Board (NPDES permits), and
5 any other state or local permit; and (6) the cost of any item described in Paragraph 14.d, 14.f,
6 14.g, 14.i or 14.j, to the extent such costs are not reimbursable or exceed the funding limits of
7 this Consent Decree. Such City Future Response Costs shall not include any City costs related to
8 any other site, including, but not limited to, the Norton Air Force Base Superfund Site.
9

10 "City Past Costs" shall mean costs incurred by the City through the date of funding of the
11 O&M and Construction Escrows, not reimbursable under the Cooperative Agreement, and not
12 otherwise reserved by the City, related to:
13

- 14 a. the Newmark and Muscoy OUs; and
 - 15 b. DTSC/City treatment systems.
- 16

17 Such costs shall include but shall not be limited to: (1) any differential due to the change in
18 location of City wells to accommodate the Site treatment systems; (2) the cost of power incurred
19 due to the requirement that the Site treatment systems be operated on a 24/7 or other schedule
20 that differs from the schedule dictated by the City's production needs; (3) the cost of land used
21 for the Site treatment systems and appurtenances; (4) the cost of comprehensive general liability
22 and property damage insurance related to the Site; (5) the cost of permits required for the Site,
23 including, but not limited to, permits required by the Department of Health Services, the Air
24 Quality Management District, the RWQCB (NPDES permits), and any other state or local
25 permit; and (6) the cost of any item described in Paragraph 14.d, 14.f, 14.g, 14.i or 14.j, to the
26 extent such costs are not reimbursable or exceed the funding limits of this Consent Decree. Such
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1 costs shall also include any costs incurred by the City for the litigation called *City of San*
2 *Bernardino, Municipal Water Department v. United States, et al.*, CV 96-8867 (MRP), through
3 the date of funding of the O&M and Construction Escrows. Such City Past Response Costs shall
4 not include any City costs related to any other site, including, but not limited to, the Norton Air
5 Force Base Superfund Site.
6

7 "Consent Decree" shall mean this Decree and all appendices attached hereto (listed in
8 Section XXIX). In the event of conflict between this Consent Decree and any appendix, this
9 Consent Decree shall control.
10

11 "Construction Escrow" shall mean the escrow account of that name that is established
12 pursuant to this Consent Decree, including interest or other returns actually earned on that
13 account (irrespective of the statutory rate of Interest, defined below). The Construction Escrow
14 shall be owned and managed by the City for (i) funding construction of treatment and directly
15 related transmission systems that expand the City's capacity to deliver potable water to its
16 residents, and (ii) funding for work performed by the City to complete construction of the
17 Muscoy OU extraction system. For the purposes of this Consent Decree, "funding for work
18 performed by the City to complete construction of the Muscoy OU extraction system" shall mean
19 funding for work performed by the City to complete construction of the five wells and
20 appurtenant facilities denominated as EPA Extraction Wells EW-108, 109, 110, 111 and 112,
21 located at 1396 North Pico Avenue, 1306 North G. Street, 980 Home Avenue, 1580 W. Virginia
22 Street, and 1335 Garner Avenue, and testing to determine that the Muscoy OU extraction and
23 treatment system is operational and functional pursuant to 40 C.F.R. § 300.435(f)(2); provided,
24 however, that (a) completion of construction for these purposes shall mean expenses incurred
25 through completion of acceptance testing up to and including the date the Muscoy extraction and
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1 treatment system is determined to be "operational and functional" under 40 C.F.R.
2 § 300.435(f)(2); and (b) "work performed by the City to complete construction of the Muscoy
3 OU extraction system" shall not include costs incurred by the City to operate, maintain, repair or
4 retrofit components of the Newmark or Muscoy OU extraction and treatment systems that were
5 constructed by EPA.
6

7 "Day" shall mean a calendar day unless expressly stated to be a working day. "Working
8 Day" shall mean a day other than a Saturday, Sunday, or federal or State holiday. In computing
9 any period of time under this Consent Decree, where the last day would fall on a Saturday,
10 Sunday, or federal or State holiday, the period shall run until the close of business of the next
11 Working Day.
12

13 "Department of Toxic Substances Control" or "DTSC" shall mean the California DTSC
14 and any of its successor departments or agencies thereto.

15 "DTSC Future Response Costs shall mean, all costs incurred by DTSC, subject to
16 DTSC's reservation of rights, after the Effective Date and beginning on the first day of a new
17 month:
18

- 19 a. for the Newmark OU, through 50 (fifty) years after October 1, 2000, the
20 date that the Newmark OU treatment system was determined by EPA to be operational and
21 functional pursuant to 40 C.F.R. § 300.435(f)(2); and
22 b. for the Muscoy OU, through 50 (fifty) years after EPA has determined that
23 the Muscoy OU is operational and functional pursuant to 40 C.F.R. § 300.435(f)(2);
24 c. for the implementation of the Site-Wide Monitoring to be performed by
25 the City pursuant to this Consent Decree, through 50 (fifty) years after EPA has determined that
26 the Muscoy OU is operational and functional pursuant to 40 C.F.R. § 300.435(f)(2).
27
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1 Such costs shall include, but not be limited to, direct and indirect costs that DTSC incurs in
2 reviewing or developing plans, reports, and other items pursuant to this Consent Decree,
3 verifying the Work, otherwise implementing or overseeing this Consent Decree.

4 "DTSC Past Response Costs" shall mean all costs incurred by DTSC that are related to
5 the contamination at the Newmark Groundwater Contamination Superfund Site through the date
6 of entry of this Consent Decree.
7

8 "Effective Date" shall be the effective date of this Consent Decree as provided in
9 Paragraph 130.

10 "EPA" shall mean the United States Environmental Protection Agency and any successor
11 departments or agencies thereto.
12

13 "Explanation of Significant Differences" or "ESD" shall mean the ESD executed by EPA
14 and attached as Appendix I to this Consent Decree.

15 "Extraordinary Costs" shall mean costs, other than Oversight Costs, which the United
16 States incurs, including, but not limited to: (1) the costs incurred by the United States to enforce
17 this Consent Decree against the City (including, but not limited to, the cost of attorney time); (2)
18 the costs incurred by the United States pursuant to Paragraph 109 of Section XXI (Work
19 Takeover); (3) the costs incurred by the United States pursuant to Section IX (Access and
20 Institutional Controls) (including, but not limited to, the cost of attorney time and any monies
21 paid to secure access and/or to secure or implement institutional controls including, but not
22 limited to, the amount of just compensation); (4) costs incurred by the United States pursuant to
23 Section XV (Emergency Response); (5) Oversight Costs incurred by EPA in the event of remedy
24 failure; or (6) the additional costs incurred by the United States in the event that EPA takes over
25 the oversight of the O&M on the Newmark or Muscoy OU or the Site-wide Monitoring pursuant
26
27
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1 to Paragraph 110 of this Consent Decree.

2 "Future Cost Account" shall mean the special account of that name to be established for
3 the Site pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and Paragraph
4 60.a.3 of this Consent Decree.

5 "Future U.S. Response Costs" shall mean, subject to the United States' reservation of
6 rights, all costs incurred by EPA, DOJ and the Settling Federal Agencies:
7

8 a. for the Newmark OU, through 50 (fifty) years after October 1, 2000, the date
9 that the Newmark OU treatment system was determined by EPA to be operational and functional
10 pursuant to 40 C.F.R. § 300.435(f)(2);
11

12 b. for the Muscoy OU, through 50 (fifty) years after EPA has determined that the
13 Muscoy OU is operational and functional pursuant to 40 C.F.R. § 300.435(f)(2); and

14 c. for the implementation of the Site-wide Monitoring to be performed by the City
15 pursuant to this Consent Decree, through 50 (fifty) years after EPA has determined that the
16 Muscoy OU is operational and functional pursuant to 40 C.F.R. § 300.435(f)(2).
17

18 Such costs shall include, but not be limited to, direct and indirect costs that the United States
19 incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree,
20 verifying the Work, otherwise implementing or overseeing this Consent Decree, and costs
21 pursuant to Section VII (Remedy Review), including, but not limited to, payroll costs, contractor
22 costs, travel costs and laboratory costs. Future U.S. Response Costs exclude Extraordinary
23 Costs.
24

25 "Groundwater Model" or "GW Model" shall mean the groundwater mathematical model
26 of the Newmark Groundwater Superfund Site developed by EPA in connection with the
27 Newmark RI/FS and to be further developed and updated by the City pursuant to this Consent
28

1 Decree, including all information and assumptions necessary to apply and maintain the
2 Groundwater Model.

3 "Interest" (when capitalized in this Consent Decree) shall mean interest at the rate
4 specified for interest on investments of the EPA Hazardous Substance Superfund established by
5 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42
6 U.S.C. § 9607(a). The applicable rate of Interest shall be the rate in effect at the time the interest
7 accrues. The rate of Interest is subject to change on October 1 of each year.
8

9 "Interest Earned" shall mean interest earned on amounts in any special account
10 established pursuant to this Consent Decree, which shall be computed monthly at a rate based on
11 the annual return on investments of the Hazardous Substance Superfund. The applicable rate of
12 interest shall be the rate in effect at the time the interest accrues.
13

14 "Interim Remedial Actions" shall mean the interim remedies selected in the Newmark
15 and Muscoy RODs.

16 "Lead Oversight Agency" shall mean EPA or DTSC, whichever has lead oversight
17 responsibility for the Site or the applicable Work.
18

19 a. Except as set forth in subparagraphs (b) and (c) of this definition, DTSC shall
20 be the Lead Oversight Agency for oversight of the O&M of the Work unless EPA, in its
21 unreviewable discretion, gives notice to DTSC and the City that a proposed change in the Work
22 or an EPA-approved schedule, or the manner in which the City is conducting the Work
23 constitutes a fundamental change in the requirements of this Consent Decree. EPA shall be the
24 Lead Agency for reviewing and approving any such fundamental change in the requirements of
25 this Consent Decree or may, in its unreviewable discretion, enforce the previously approved
26 requirements of this Consent Decree.
27
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1 b. EPA shall be the Lead Oversight Agency for the development, review and
2 approval of any workplan or other document that specifies Work to be performed by the City,
3 which is to be submitted to EPA for approval or developed by EPA pursuant to this Consent
4 Decree, or, if applicable, the Cooperative Agreement. After approval by EPA or entry of this
5 Consent Decree, whichever occurs last, and except as set forth in subparagraphs (a) and (c) of
6 this definition, DTSC shall be the Lead Oversight Agency for oversight of the O&M of the
7 Work. In the event that DTSC or the City proposes, or DTSC approves, any fundamental change
8 in the Work or an EPA-approved schedule, or the manner in which the City is conducting the
9 Work, DTSC shall notify EPA. EPA's concurrence shall be required before any proposed
10 fundamental change may be implemented in the Work or an EPA-approved schedule, or the
11 manner in which the City is conducting the Work.
12

13
14 c. EPA shall be the Lead Oversight Agency for (i) performance of five-year
15 reviews pursuant to Section VII (Remedy Review); (ii) Certification of Completion or Notice of
16 Completion pursuant to Paragraph 57; (iii) performance of any portion of the Work that EPA
17 takes over pursuant to Paragraph 109 or otherwise performs; (iv) implementation of Section XIII
18 (Assurance of Ability to Complete the Work); and (v) enforcement of any obligation of the City
19 to EPA only under this Consent Decree or the Cooperative Agreement. EPA also shall be the
20 Lead Oversight Agency in any action to enforce this Consent Decree or the SOW in the event
21 that a change in the work being performed by the City constitutes a fundamental change to the
22 requirements of the Consent Decree or the SOW, and that such change was made without EPA's
23 concurrence. Without EPA concurrence, any such fundamental change shall not be
24 implemented.
25

26
27 "Lead Oversight" shall mean performance of day-to-day oversight of the Work to ensure
28

1 that the City is in compliance with this Consent Decree. Lead Oversight includes, but is not
2 limited to, primary responsibility for reviewing, developing or responding to reports and other
3 items pursuant to this Consent Decree, verifying the Work, which may include periodically
4 inspecting City O&M practices, directing the City in compliance-related matters, otherwise
5 implementing or overseeing this Consent Decree, coordinating with the Support Oversight
6 Agency, responding to public inquiries regarding the Site or the Work, and responding to
7 conditions arising at the Site that require regulatory intervention or assistance. Lead Oversight
8 includes enforcement authority, including but not limited to the imposition of stipulated penalties
9 for failure to comply with this Consent Decree or the SOW.
10

11 "Municipal sewage sludge" shall mean any solid, semi-solid, or liquid residue removed
12 during the treatment of municipal waste water or domestic sewage, and may include residue
13 removed, all or in part, during the treatment of wastewater from manufacturing or processing
14 operations, provided that such residue has essentially the same characteristics as residue removed
15 during the treatment of domestic sewage.
16

17 "Municipal solid waste" shall mean household waste and solid waste collected from non-
18 residential sources that is essentially the same as household waste. While the composition of
19 such wastes may vary considerably, municipal solid waste generally is composed of large
20 volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and
21 can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D
22 landfills.
23

24 "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous
25 Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42
26 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.
27
28

1 "Net Present Value" or "NPV" shall mean, as used in this Consent Decree, the dollar
2 value as stated in the applicable provision of the Consent Decree, as adjusted for inflation by an
3 annual average of 3% beginning on January 1, 2003.

4 "Newmark Groundwater Contamination Superfund Site" shall mean the site listed by
5 EPA on the NPL, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal
6 Register on March 31, 1989, 54 Fed. Reg. 13296, 13301.

7
8 "Operation and Maintenance" or "O&M" shall mean (1) all activities required to operate
9 and to maintain the effectiveness of the Interim Remedial Action at the Newmark OU beginning
10 on the day after the Newmark Interim Remedial Action is determined by EPA to be operational
11 and functional as defined in 40 C.F.R. § 300.435(f)(2); and (2) all activities required to operate
12 and to maintain the effectiveness of the Interim Remedial Action at the Muscoy OU beginning on
13 the day after the Muscoy Interim Remedial Action is determined by EPA to be operational and
14 functional as defined in 40 C.F.R. § 300.435(f)(2). Except to the extent required as part of Non-
15 Routine O&M under the Statement of Work, O&M shall not mean any activities required to
16 construct, operate or maintain the City's potable water supply system after the point of
17 interconnection between the Newmark and/or Muscoy treatment systems and the City's potable
18 water supply system, or any activities required to construct, operate or maintain other extraction
19 and treatment facilities for the City's water supply.

20
21
22 "O&M Escrow" shall mean the escrow account of that name that is established pursuant
23 to this Consent Decree, including interest or other return actually earned on that account
24 (irrespective of the statutory rate of Interest, defined above). The O&M Escrow shall be owned
25 and managed by the City, and shall be used for (i) O&M of the Site, including Non-Routine
26 O&M expenses as described in the Statement of Work; (ii) development and management of the
27

1 Groundwater Model, provided, however that such amount, combined with any expenditures to
2 implement Section IX (Access and Institutional Controls) shall not exceed \$ 1,000,000 (one
3 million) net present value ("NPV"); (iii) implementation of access and institutional controls as
4 provided in Section IX (Access and Institutional Controls), Paragraphs 27-30, 32 and 33 of this
5 Consent Decree, provided, however, that such amount, combined with any expenditures to
6 develop and manage the Groundwater Model, shall not exceed \$ 1,000,000 (one million dollars)
7 NPV; (iv) the Site-wide Monitoring; (v) related activities as specified in this Consent Decree or
8 any of its appendices; (vi) repair or retrofit of the Newmark or Muscoy OU extraction or
9 treatment systems required by the Lead Oversight Agency during O&M, provided that the City
10 reserves the right to contend that any such repair or retrofit is the fault of EPA or a third party,
11 and (vii) five year review activities requested by EPA. The O&M Escrow shall not be used by
12 the City for any other purpose.
13

14
15 "Oversight Costs" shall mean all direct and indirect costs that the United States and
16 DTSC incur in reviewing or developing plans, reports and other items pursuant to this Consent
17 Decree, verifying the Work, otherwise implementing or overseeing this Consent Decree, and
18 costs pursuant to Section VII (Remedy Review), including, but not limited to, payroll costs,
19 contractor costs, travel costs and laboratory costs. Oversight Costs shall not include
20 Extraordinary Costs.
21

22 "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral
23 or an upper case letter.
24

25 "Parties" shall mean the United States, DTSC and the City.

26 "Past U. S. Response Costs" shall mean all costs that are incurred by EPA, DOJ and the
27 Settling Federal Agencies that are related to the Newmark and Muscoy OUs up to the date each
28

1 OU is determined by EPA to be operational and functional pursuant to 40 C.F.R. § 300.435(f)(2),
2 plus O&M of the Newmark OU extraction and treatment system through September 30, 2002;
3 and for the Source Control OU up to the date of issuance of the Proposed Plan for the Source
4 Control OU. Such costs shall also include any and all costs incurred by the United States for the
5 litigation styled, *City of San Bernardino, Municipal Water Department v. United States Army, et*
6 *al.*, CV 96-8867 (MRP) and *State of California v. United States Army, et al*, CV 96-5205 (MRP)
7 through the date of entry of this Consent Decree.
8

9 "Performance Standards" shall mean the cleanup standards and other measures of
10 achievement of the goals of the Interim Remedial Actions set forth in the Newmark and Muscoy
11 OU RODs and the ESD, and the Work requirements of this Consent Decree and the SOW,
12 including but not limited to (1) the extraction and treatment of volatile organic compounds in the
13 extracted groundwater in the amounts and according to the specifications described in the RODs,
14 the O&M Plans, and the SOW to inhibit effectively the migration of volatile organic compounds
15 beyond the barrier wells and to meet all federal and State drinking water permit standards; (2) the
16 acceptance of the extracted, treated water by the City into its potable water supply, provided that
17 the water meets all federal and State permit requirements for drinking water; and (3) the effective
18 implementation of institutional controls established by the ESD to protect the barrier well
19 systems.
20
21

22 "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et
23 seq. (also known as the Resource Conservation and Recovery Act).
24

25 "Records of Decision" or "RODs" shall mean the EPA Records of Decision relating to
26 the Newmark OU signed on August 4, 1993 and relating to the Muscoy OU signed on March 24,
27 1995 by the Regional Administrator, EPA Region 9, or his/her delegatee, and all attachments
28

1 thereto; and the Explanation of Significant Differences signed by the Regional Administrator,
2 EPA Region 9, or his/her delegatee, and all attachments thereto. The Newmark and Muscoy OU
3 RODs are referred to herein as the Newmark ROD and the Muscoy ROD, respectively, and are
4 attached as Appendices A and B. The Explanation of Significant Differences is attached as
5 Appendix I.
6

7 "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

8 "Settling Federal Agencies" shall mean the United States Department of the Army and
9 any other federal agencies that are resolving any claims which have been or which could have
10 been asserted against them with regard to the Site as provided in this Consent Decree, or that may
11 have liability for the Site or the Site-wide Monitoring.
12

13 "Site" shall mean the Newmark and Muscoy OUs of the Newmark Groundwater
14 Contamination Superfund Site, located in the City and County of San Bernardino, California,
15 and depicted generally on the map attached as Appendix C. The Site does not include any other
16 OUs in the Newmark Groundwater Contamination Superfund Site or any areas outside of the
17 Newmark Groundwater Contamination Superfund Site.
18

19 "Site-wide Monitoring" shall mean the monitoring program specified in the SOW for the
20 Newmark Groundwater Contamination Superfund Site.

21 "Source Control Operable Unit" or "Source Control OU" shall mean the operable unit for
22 the investigation and remediation of sources of contamination in the Newmark Groundwater
23 Contamination Superfund Site.
24

25 "State" shall mean the State of California, including its agencies, departments and
26 instrumentalities and any successor agencies, departments and instrumentalities.

27 "Statement of Work" or "SOW" shall mean the statement of work for implementation of
28

1 the Newmark and Muscoy RODs and the Site-wide Monitoring as set forth in Appendix D to this
2 Consent Decree and any modifications made in accordance with this Consent Decree.

3 "Supervising Contractor" shall mean either the City of San Bernardino Municipal Water
4 Department or the principal contractor retained by the City to supervise and direct the
5 implementation of the portion of the Work under this Consent Decree for which the City is
6 responsible.
7

8 "Support Oversight Agency" shall mean EPA or DTSC, whichever has Support Oversight
9 responsibility for the Work or some component of the Work.

10 "Support Oversight" shall mean performance of secondary oversight of the Work to
11 ensure that the City is in compliance with this Consent Decree. Support Oversight includes, but
12 is not limited to, secondary responsibility for reviewing, developing or responding to plans,
13 reports and other items pursuant to this Consent Decree, verifying the Work, which may include
14 periodically inspecting City O&M practices, directing the City in compliance-related matters,
15 otherwise implementing or overseeing this Consent Decree, coordinating with the Lead
16 Oversight Agency, responding to public inquiries regarding the Site or the Work, and responding
17 to conditions arising at the Site that require regulatory intervention or assistance.
18
19

20 "United States" shall mean the United States of America, including all of its agencies,
21 departments and instrumentalities and any successor agencies, departments and instrumentalities
22 thereto.

23 "USACE" shall mean the United States Army Corps of Engineers, including its
24 departments or instrumentalities or any successor departments or instrumentalities, which is that
25 department of the United States Army that has been designated responsible for Formerly Used
26 Defense Facilities.
27
28

1 "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of
2 CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42
3 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C.
4 § 6903(27); and (4) any "hazardous material" under California Health & Safety Code § 25501(o).

5 "Work" shall mean all activities that the City is required to perform under this Consent
6 Decree, except those required by Section XXV (Retention of Records).
7

8 V. GENERAL PROVISIONS.

9 5. Objectives of the Parties. The objectives of the Parties in entering into this
10 Consent Decree are to protect public health or welfare or the environment at the Site by the
11 design and implementation of response actions at the Site by the Parties, to reimburse in part the
12 response costs of EPA and DTSC, and to resolve the claims of the Parties against each other with
13 respect to the Site and the Work.
14

15 6. Commitments by the Parties.

16 a. The City shall finance and/or perform the Work in accordance with this
17 Consent Decree, the RODs, the ESD, the SOW, and all work plans and other plans, standards,
18 specifications, and schedules set forth herein or developed by the City and approved by EPA
19 pursuant to this Consent Decree. The City shall complete the construction of the Muscoy
20 Operable Unit extraction system, first using \$ 6,249,000 currently obligated by EPA for that
21 purpose, and then using other funds, which the City may withdraw from the Construction
22 Escrow.
23

24 b. EPA funded the construction of the Newmark Operable Unit extraction
25 and treatment system, and has funded the O&M of the Newmark Operable Unit up to the date of
26 entry of this Consent Decree. EPA has obligated \$ 6,249,000 to complete the construction of the
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1 Muscoy Operable Unit extraction and treatment system. Subject to the continued availability of
2 this federal funding, EPA shall fund the construction of the Muscoy Operable Unit extraction and
3 treatment system, using the currently obligated \$ 6,249,000. Provided, however, that the City
4 shall fund all activities that are necessary to correct deficiencies in the portion of such
5 construction activities performed by the City, including, but not limited to, acceptance testing
6 that lasts more than one year. EPA and the City each reserve the right to contend that each other
7 or a third party should be responsible for any particular cost item.

9 c. The Settling Federal Agencies shall finance portions of the Work as
10 provided in Section XVI (Payments for Response Costs). The City and the Settling Federal
11 Agencies shall also reimburse the United States and DTSC for certain DTSC Past Response
12 Costs, Past U.S. Response Costs and certain other response costs as provided in this Consent
13 Decree. DTSC shall perform oversight as provided in Paragraph 15.

15 7. Compliance With Applicable Law. All activities undertaken by the Parties
16 pursuant to this Consent Decree shall be performed in accordance with the requirements of all
17 applicable federal and state laws and regulations. The Parties must also comply with all
18 applicable or relevant and appropriate requirements of all federal and state environmental laws as
19 set forth in the RODs and the SOW. The activities conducted pursuant to this Consent Decree, if
20 approved by EPA, or, if applicable, DTSC, shall be considered to be consistent with the NCP.

22 8. Permits.

23 a. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and
24 Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work
25 conducted entirely on-site (i.e., within the areal extent of contamination or in very close
26 proximity to the contamination and necessary for implementation of the Work). Where any
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1 portion of the Work to be performed by the City that is not on-site requires a federal or state
2 permit or approval, the City shall submit timely and complete applications and take all other
3 actions necessary to obtain all such permits or approvals. Where any state permit or approval is
4 required, DTSC shall assist the City in any manner that is practicable to obtain such permits or
5 approvals. Such assistance shall include coordination with other State agencies, including
6 intervention on the City's behalf if appropriate.
7

8 b. The City may seek relief under the provisions of Section XVIII (Force
9 Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a
10 failure to obtain, or a delay in obtaining, any permit required for the Work, where the City has
11 complied with Paragraph 8.a.
12

13 c. This Consent Decree is not, and shall not be construed to be, a permit
14 issued pursuant to any federal or state statute or regulation.
15

16 9. Notice to Successors-in-Title.
17

18 a. With respect to any real property owned or controlled by the City that
19 contains stationary extraction and treatment system equipment, extraction wells, pumps,
20 monitoring wells or other stationary equipment used as part of the Newmark or Muscoy OU, or
21 the Site-wide Monitoring, within 15 (fifteen) days after the entry of this Consent Decree, the City
22 shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, San
23 Bernardino County, State of California, which shall provide notice to all successors-in-title that
24 the property is part of the Site, that EPA selected interim remedies for the Site in the Newmark
25 ROD, executed on August 4, 1993, and in the Muscoy ROD, executed on March 24, 1995, and in
26 the ESD, and that the Parties have entered into a Consent Decree requiring implementation of the
27 Interim Remedial Actions. The Notice shall identify the action as being filed in the United States
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1 District Court for the Central District of California, the case numbers, the parties and the date this
2 Consent Decree was entered by the Court. The City shall record the notice(s) within 10 (ten)
3 days of EPA's approval of the notice(s). The City shall provide EPA and DTSC with a certified
4 copy of the recorded notice(s) within 10 (ten) days of recording such notice(s). The notice need
5 not detail any real property containing pipelines and appurtenant facilities located beneath public
6 streets.
7

8 b. At least 30 (thirty) days prior to the conveyance of any interest in
9 real property owned or controlled by the City (other than public streets), that is referred to
10 in the notice recorded under Paragraph 9.a., including, but not limited to, fee interests,
11 leasehold interests, and mortgage interests, the City shall give the grantee written notice of
12 (i) this Consent Decree, (ii) any instrument by which an interest in real property has been
13 conveyed that confers a right of access to the Site (hereinafter referred to as "access
14 easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any
15 instrument by which an interest in real property has been conveyed that confers a right to
16 enforce restrictions on the use of such property (hereinafter referred to as "restrictive
17 easements") pursuant to Section IX (Access and Institutional Controls). At least 30
18 (thirty) days prior to such conveyance, the City shall also give written notice to EPA and
19 DTSC of the proposed conveyance, including the name and address of the grantee, and the
20 date on which notice of the Consent Decree, access easements, and/or restrictive
21 easements was given to the grantee. For the purposes of providing the notice required by
22 this subparagraph b, the City may furnish potential grantees with a preliminary title report
23 issued by a title company transacting business in California, provided such preliminary
24 title report includes the information required to be conveyed by this subparagraph. The
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1 obligation to provide the notice required by this subparagraph shall terminate when the
2 obligations of the City pursuant to this Consent Decree with respect to the subject portions
3 of the Interim Remedial Actions are completed.

4 c. In the event of any such conveyance, the City's obligations under
5 this Consent Decree, including, but not limited to, its obligation to provide or secure
6 access and institutional controls, as well as to abide by such institutional controls, pursuant
7 to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to
8 be met by the City. In no event shall the conveyance release or otherwise affect the
9 liability of the City to comply with all provisions of this Consent Decree, absent the prior
10 written consent of EPA. If the United States approves, the grantee may perform some or
11 all of the Work under this Consent Decree.
12
13

14 VI. PERFORMANCE OF THE WORK.

15 10. Selection of Supervising Contractor.

16 a. All aspects of the Work to be performed by the City pursuant to
17 Sections VI (Performance of the Work), VII (Remedy Review), VIII (Quality Assurance,
18 Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall
19 be under the direction and supervision of the Supervising Contractor, the selection of
20 which shall be subject to disapproval by the Lead Oversight Agency after a reasonable
21 opportunity for review and comment by the Support Oversight Agency.
22

23 b. EPA has approved the City's Municipal Water Department as the
24 City's Supervising Contractor, and DTSC concurs. If at any time after entry of this
25 Consent Decree, the City proposes to change the Supervising Contractor, the City shall
26 give such notice to the Lead and Support Oversight Agencies, and must obtain an
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1 authorization to proceed from the Lead Oversight Agency, after a reasonable opportunity
2 for review and comment by the Support Oversight Agency, before the new Supervising
3 Contractor performs, directs, or supervises any Work under this Consent Decree.

4 c. If the Lead Oversight Agency disapproves a proposed Supervising
5 Contractor, the Lead Oversight Agency will notify the Parties in writing. In that event, the
6 City shall submit to EPA and DTSC a list of contractors, including their qualifications,
7 that would be acceptable to the City within 30 (thirty) days of receipt of the Lead
8 Oversight Agency's disapproval of the contractor previously proposed. The Lead
9 Oversight Agency, after a reasonable opportunity for review and comment by the Support
10 Oversight Agency, will provide written notice of the names of any contractor(s) that it
11 disapproves and an authorization to proceed with respect to any of the other contractors.
12 The City may select any contractor from that list that is not disapproved and shall notify
13 EPA and DTSC of the name of the contractor selected within 21 (twenty-one) days of the
14 Lead Oversight Agency's authorization to proceed.

15 d. If the Lead Oversight Agency fails to provide written notice of its
16 authorization to proceed or disapproval as provided in this Paragraph and this failure
17 prevents the City from meeting one or more deadlines in a plan approved or developed by
18 EPA pursuant to this Consent Decree or the Cooperative Agreement, the City may seek
19 relief under the provisions of Section XVIII (Force Majeure) hereof.

20 11. Remedial Design. EPA performed and paid for the remedial design for the
21 Interim Remedial Action at the Newmark OU, and is performing and paying for the
22 remedial design for the Interim Remedial Action at the Muscoy OU, including the
23 development and implementation of Remedial Design Work Plans and Health and Safety
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1 Plans for field design activities which conform to the applicable Occupational Safety and
2 Health Administration and EPA requirements including, but not limited to, 29 C.F.R.
3 § 1910.120.

4 12. Interim Remedial Action. EPA developed and is paying for the Interim
5 Remedial Actions for the Site. EPA has implemented the Newmark OU Interim Remedial
6 Action Work Plan. Any work plan for implementation of the Muscoy OU Interim
7 Remedial Action is incorporated into this Consent Decree. EPA also developed Health
8 and Safety Plans for field activities required by the Interim Remedial Action work plans
9 that conform to the applicable Occupational Safety and Health Administration and EPA
10 requirements including, but not limited to, 29 C.F.R. § 1910.120. The Health and Safety
11 Plans for field activities required by the Muscoy Remedial Action Work Plan are
12 incorporated into this Consent Decree.

13 a. EPA shall implement the Muscoy Remedial Design Work Plan.
14 Unless approved by EPA, the City shall not conduct physical Interim Remedial Action
15 activities at the Site.

16 b. Nothing in this Consent Decree shall prohibit EPA in its
17 unreviewable discretion from revising the Muscoy Remedial Action Work Plan or any
18 other work plan to be implemented in accordance with CERCLA and the NCP. However,
19 the City's obligations, if any, to fund such revisions or perform work in accordance with
20 such revisions shall be governed by the terms of this Consent Decree and the SOW.

21 13. The City shall implement the O&M and other Work, as more particularly
22 set forth in Paragraph 14 of this Consent Decree (City Obligations), the RODs, the SOW
23 and the ESD, until the Performance Standards are achieved and for so long thereafter as is
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1 otherwise required under this Consent Decree.

2 14. City Obligations.

3 a. City O&M Obligations

4 (1) The City shall perform the O&M on the Newmark and Muscoy
5 OUs (including the development of the Groundwater Model and the groundwater
6 management program) and the Site-wide Monitoring referenced in this Consent Decree
7 consistent with the RODs, the ESD and the SOW, and shall achieve the Performance
8 Standards, until the earliest of (1) final Certification of Completion under Paragraph 57.d
9 (Certification of Completion); (2) final Notice of Completion under Paragraph 57.e; (3)
10 with respect to the Newmark OU, fifty (50) years after October 1, 2000; (4) with respect to
11 the Muscoy OU, fifty (50) years after the Muscoy OU is determined by EPA to be
12 operational and functional pursuant to 40 C.F.R. § 300.435(f)(2); (5) with respect to the
13 Site-wide Monitoring, fifty (50) years after the Muscoy OU is determined by EPA to be
14 operational and functional pursuant to 40 C.F.R. § 300.435(f)(2); and (6) with respect to
15 the implementation of institutional controls, including but not limited to the groundwater
16 management and permit program described in Paragraphs 27-30, fifty (50) years after entry
17 of this Consent Decree.
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19 (2) After O&M is completed as described in Paragraph 14.a.1, the
20 City may decommission the extraction and treatment systems under the direction of the
21 Lead Oversight Agency, after a reasonable opportunity for review and comment by the
22 Support Oversight Agency, and may fund such activities from the O&M Escrow. If the
23 City elects to continue the operation of the extraction and treatment systems rather than
24 decommission them after O&M is completed as described in Paragraph 14.a.1, then the
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1 City shall bear the expense of any such operation and maintenance and any later de-
2 commissioning of these systems out of financial resources other than the O&M Escrow or
3 the Construction Escrow.

4 (3) After the entry of this Consent Decree and before funding of the
5 O&M Escrow pursuant to Paragraph 60.a of this Consent Decree, the City shall be entitled
6 to reimbursement for O&M Escrow-covered costs from the Cooperative Agreement,
7 provided, however, that the City shall reimburse EPA for any such amounts upon funding
8 of the O&M Escrow. With respect to work undertaken by the City prior to entry of this
9 Consent Decree in order to prepare the deliverable items listed on the deliverable schedule
10 of the SOW, once the O&M Escrow is funded, the City shall be entitled to reimbursement
11 from the O&M Escrow for such work as an allowable expense, unless such expense has
12 been reimbursed to the City under the Cooperative Agreement and is not required to be
13 reimbursed to EPA pursuant to this Consent Decree.

14 b. The City shall implement and fund the following items at its own
15 expense: (1) except during periods of production in excess of the Maximum Routine
16 Extraction Rates in order to comply with the Statement of Work, the differential, if any,
17 due to the change in location of City wells to accommodate the Site treatment systems; (2)
18 the cost of power incurred due to the requirement that the Site treatment systems be
19 operated on a 24/7 or other schedule that differs from the schedule dictated by the City's
20 production needs; (3) the cost of land used for the Site treatment systems and
21 appurtenances; (4) the cost of comprehensive general liability and property damage
22 insurance related to the Site; (5) the cost of permits required for the Site, including, but
23 not limited to, permits required by the Department of Health Services, the Air Quality
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1 Management District, the RWQCB (NPDES permits), and any other state or local permit;
2 (6) the cost of any item described in Paragraph 14.d, 14.f, 14.g, 14.i or 14.j. to the extent
3 the cost of any such item is not reimbursable or exceeds the funding limits established by
4 this Consent Decree; (7) the cost of developing, updating and maintaining the
5 Groundwater Model and implementing the groundwater management and permit program
6 described in Paragraphs 27-30 to the extent such costs are not reimbursable or exceed the
7 funding limits established in this Consent Decree; and (8) the repair or retrofit of
8 components of the Newmark or Muscoy extraction and treatment systems or any delay in
9 acceptance testing that is the fault of the City, provided, however, that such claims must be
10 raised in writing by the Lead or Support Oversight Agency prior to EPA's certification that
11 the extraction system in question is operational and functional.
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13
14 c. The City shall be reimbursed for the costs of O&M (including Non-
15 Routine O&M costs as defined in the SOW that are not reimbursed to the City by
16 insurance), Site-wide Monitoring, work requested by EPA in support of five year reviews
17 pursuant to Section VII, Paragraph 20, and certain costs of managing the Groundwater
18 Model and implementing institutional controls up to the monetary limits of the O&M
19 Escrow, including interest earned thereon; provided, however, that:
20

21 (1) Amounts funded from the O&M Escrow to develop, update and
22 maintain the Groundwater Model, and to implement Section IX (Access and Institutional
23 Controls), Paragraphs 27-30, 32 and 33 collectively shall not exceed \$1,000,000 (one
24 million dollars) NPV; and
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26 (2) The O&M Escrow may not be used to fund the following cost
27 items: (a) any item described in Paragraph 14.b, except for (i) the use of DTSC-
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1 constructed or City-constructed treatment systems during a maintenance outage of the
2 EPA-constructed treatment system, while the water produced by the Newmark or Muscoy
3 extraction systems is sent to the DTSC- or City-constructed treatment systems during such
4 an outage, to the extent that the water treated in the DTSC- or City-constructed treatment
5 systems during such an outage is the same water that would otherwise have been treated in
6 the EPA-constructed treatment system, in accordance with the procedures of the SOW,
7 and (ii) for the use of DTSC- or City-constructed treatment systems as part of non-routine
8 O&M required by the Lead Oversight Agency; (b) Extraordinary Costs, except the costs of
9 reimbursing EPA for work performed pursuant to a Work Takeover under Paragraph 109;
10 (c) penalties pursuant to this Consent Decree; (d) costs incurred pursuant to Paragraph 109
11 of this Consent Decree (Work Takeover), except the costs of reimbursing EPA for work
12 performed pursuant to a Work Takeover under Paragraph 109 of this Consent Decree; (e)
13 costs found to be unallowable after a finally adjudicated audit under OMB Circular A-133;
14 (f) any cost excluded from disbursement under Paragraph 71.a., unless such cost is
15 expressly authorized by the Cooperative Agreements, this Consent Decree or the SOW; (g)
16 the costs of implementing Paragraphs 27-30, 32 and 33 of this Consent Decree, to the
17 extent such costs exceed the funding limits established by this Consent Decree; (h) any
18 cost that is not O&M of the Newmark and Muscoy OUs, implementation of Section IX of
19 this Consent Decree (Access and Institutional Controls), Groundwater Modeling and
20 updates, work to support Five-year Reviews or Site-wide Monitoring; and except as the
21 Lead Oversight Agency, with the concurrence of the Support Agency, agrees otherwise (i)
22 the repair or retrofit of components of the Newmark or Muscoy OU extraction and
23 treatment systems that are the fault of the City, provided, however, that any such claims
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1 must be made by the Lead or Support Oversight Agency in writing prior to EPA's
2 certification that the extraction and treatment system in question is operational and
3 functional.

4 d. The City shall complete the construction of the Muscoy OU
5 extraction system as specified in the Cooperative Agreement. In addition to the
6 \$6,249,000 in funding provided under the Cooperative Agreement, the City may use
7 money from the Construction Escrow to fund such construction, provided, however, that
8 work performed by the City to complete the construction of the Muscoy OU extraction
9 system shall not include costs incurred by the City to operate, maintain, repair or retrofit
10 components of the Newmark or Muscoy OU extraction and treatment systems that were
11 constructed by EPA.
12

13 e. Pursuant to the Cooperative Agreement, as of the date of entry of
14 this Consent Decree, EPA has already obligated \$6,249,000 of appropriated money to
15 complete construction of the Muscoy extraction system. The City, as part of this
16 settlement, will continue the construction work on the Muscoy extraction system, first
17 using the \$6,249,000 under the Cooperative Agreement, and if that funding is exhausted
18 before the extraction system is determined to be operational and functional, the City shall
19 be entitled to draw down the Construction Escrow in order to complete that work.
20

21 f. Until final Certification of Completion of the O&M as provided for
22 in Paragraph 57.d or final Notice of Completion as provided for in Paragraph 57.e, the
23 City shall perform any necessary construction related to the expansion of the existing
24 extraction and treatment systems constructed by DTSC and any City-owned or other City-
25 operated treatment plants and transmission systems to expand the City's potable water
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1 delivery capacity. A proposed schedule for such construction is attached to this Consent
2 Decree as Appendix E. The City shall be entitled to fund the construction of such work
3 with the Construction Escrow, but shall be responsible for any additional construction
4 costs after the Construction Escrow is exhausted.

5
6 g. Until final Certification of Completion of the O&M as provided
7 for in Paragraph 57.d or final Notice of Completion as provided for in Paragraph 57.e on
8 the Newmark and Muscoy OUs, the City shall perform the operation and maintenance of
9 any expansion systems and any other City or DTSC extraction and treatment systems
10 referred to in Paragraph 14.f and shall be responsible for all such costs. Provided,
11 however, that in the maintenance outage or non-routine O&M situations referred to in
12 Paragraph 14.c(2)(a) of this Consent Decree, the City may draw upon the O&M Escrow to
13 pay for such costs.
14

15 h. Until final Certification of Completion of the O&M as provided for
16 in Paragraph 57.d or final Notice of Completion as provided for in Paragraph 57.e on the
17 Newmark and Muscoy OUs, the City shall perform Site-wide Monitoring as specified in
18 the SOW. The City shall be reimbursed for the costs of such monitoring up to the
19 monetary limits of the O&M Escrow.
20

21 i. In accordance with Section IX of this Consent Decree (Access and
22 Institutional Controls), the City shall adopt and implement a groundwater management and
23 permit program governing: (1) the installation of new wells in the Permit Zone (as defined
24 in Paragraph 27.a); (2) the reconstruction of existing wells in the Permit Zone to increase
25 the capacity of such wells; and (3) the increased spreading of water in spreading basins
26 within the City and upgradient of the Newmark and Muscoy extraction and treatment
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1 systems. Where not provided as part of permit requirements, the City shall secure such
2 additional access and institutional controls, including those necessary to ensure that the
3 Newmark and Muscoy Interim Remedial Actions' effectiveness is not compromised by
4 increased well production or groundwater management practices such as increased
5 spreading of water. The City shall be entitled to seek reimbursement for certain costs
6 associated with the implementation of the institutional controls in accordance with this
7 Paragraph from the O&M Escrow.
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9 j. The City shall develop, apply and maintain the Groundwater Model,
10 and seek and use its best efforts to obtain water level and water quality data that EPA
11 determines is necessary to develop and update the Groundwater Model. The City also
12 shall obtain other data and conduct studies requested by EPA in support of five year
13 reviews pursuant to Paragraph 20 of this Consent Decree. The City shall be entitled to
14 seek reimbursement from the O&M Escrow for the costs (including consultants' and staff
15 time) associated with these data gathering efforts and studies and for developing, applying
16 and maintaining the Groundwater Model, up to the funding limits established by this
17 Consent Decree.
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20 k. When EPA transfers responsibility for maintaining the Groundwater
21 Model to the City in accordance with the SOW, the City shall assume the responsibility for
22 maintaining the Groundwater Model in accordance with the schedule and specifications of
23 the SOW.
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25 l. The City and DTSC shall refrain from taking or supporting any
26 action individually, or jointly with any other authority, that would interfere with or
27 otherwise be inconsistent with the requirements of the Newmark and Muscoy RODs, the
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1 ESD, the SOW and this Consent Decree.

2 15. DTSC/EPA Lead Oversight Agency Obligations. DTSC shall perform as
3 the Lead Oversight Agency for the O&M of the Work performed under this Consent
4 Decree, except as set forth herein. EPA shall perform as the Lead Oversight Agency for
5 the Newmark and Muscoy OUs up to and including the date that EPA determines that such
6 OU is operational and functional pursuant to 40 C.F.R. § 300.435(f)(2), or until entry of
7 this Consent Decree, whichever occurs later, and as otherwise set forth herein.
8

9 16. United States/EPA Obligations.

10 a. The United States, on behalf of the Settling Federal Agencies, shall
11 make the payments described in Section XVI of this Consent Decree (Payments for
12 Response Costs).
13

14 b. Upon entry of this Consent Decree, the ownership of the Newmark
15 and Muscoy extraction and treatment systems and appurtenant facilities ("such systems")
16 shall be transferred to the City of San Bernardino Municipal Water Department by the
17 United States. Until such transfer is made, the United States shall bear the risk of any loss
18 or damage to such systems. After such transfer of ownership, the City shall bear the risk
19 of any loss or damage to and shall maintain reasonable insurance coverage on such
20 systems to protect against damage or loss of them arising from insurable risks, as provided
21 in Section XVII (Indemnification and Insurance) of this Consent Decree.
22

23 c. The United States shall cooperate in the defense of any claim
24 against the United States that is subject to the indemnity described in Paragraph 74.b of
25 this Consent Decree in accordance with the requirements of that Paragraph and pursuant to
26 Paragraph 1.b shall cooperate in the defense of the Interim Remedial Actions, permit
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1 program and permit decisions.

2 17. Modification of the SOW or Related Work Plans.

3 a. If EPA or DTSC determines that modification to the work specified
4 in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve
5 and maintain the Performance Standards or otherwise to carry out and maintain the
6 effectiveness of the remedies set forth in the RODs, EPA or DTSC may require that such
7 modification be incorporated in the SOW or such work plans. Provided, however, that a
8 modification may only be required pursuant to this Paragraph to the extent that it is
9 consistent with the scope of the interim remedies selected in the RODs.
10

11 b. For the purposes of this Paragraph 17 and Paragraph 57.c, the
12 "scope of the interim remedies selected in the RODs" is: the work necessary for the
13 effective implementation of the Newmark and Muscoy OU selected interim remedies as
14 set forth in the Newmark and Muscoy RODs, the implementation of institutional controls
15 as provided in the ESD, and the work necessary for the effective monitoring of the
16 Newmark Groundwater Contamination Superfund Site. The "scope of the interim
17 remedies selected in the RODs" shall include any necessary and appropriate adjustments,
18 measures or actions to ensure the effectiveness of the Newmark and Muscoy OU
19 extraction systems and barrier well systems, except activities that are (1) required to be
20 documented in an amendment to a ROD under the NCP; or (2) that require the City to
21 expand its untreated water transmission capacity.
22

23 c. Provided, however, that (1) the City shall undertake Non-Routine
24 O&M as required pursuant to this Consent Decree and the SOW, but that the total cost of
25 such Non-Routine O&M shall not, over the life of the Work required by this Consent
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1 Decree and the SOW, exceed \$20,000,000 (twenty million dollars) NPV if reimbursed to
2 the City by insurance. While such insurance is in force, the City shall not be required to
3 contribute to the costs of Non-Routine O&M beyond the amount of any applicable
4 copayments or deductibles; and (2) for any time period for which there is no insurance, the
5 City shall be required to contribute to the costs of Non-Routine O&M up to the following
6 amounts. The total spent by the City that is not reimbursed by insurance for Non-Routine
7 O&M shall not, over the life of the Work required by this Consent Decree and the SOW,
8 exceed \$10,000,000 (ten million dollars) NPV, which may be drawn from the O&M and
9 Construction Escrows, plus an additional amount, up to \$5,000,000 (five million dollars)
10 NPV, representing the sum of (a) the cumulative net actual savings on O&M and
11 construction realized by the City from the estimated annual O&M costs, and (b) the
12 portion of cumulative net water sale proceeds to be returned for the benefit of the O&M
13 Escrow by the City pursuant to the SOW. (The sum of (a) and (b) shall be referred to as
14 the Contingency Account.) This limit shall be referred to as the "Uninsured Limit." Any
15 co-pay or deductibles paid by the City under applicable insurance may be charged against
16 this Uninsured Limit.
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20 d. Provided further, that the City shall use its best efforts to procure
21 insurance at commercially reasonable rates to cover the costs of Non-Routine O&M up to
22 an aggregate of \$20,000,000 (twenty million dollars) NPV over the life of this Consent
23 Decree. The City may determine, however, through the process set forth in the SOW, with
24 the concurrence of the Lead and Oversight Agencies, that such insurance is unavailable at
25 commercially reasonable rates, not cost-effective, or that such insurance is otherwise
26 inappropriate. In the event of such a determination, the City shall not be obliged to
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1 purchase such insurance.

2 e. If the City objects to any modification determined by EPA or DTSC
3 to be necessary pursuant to this Paragraph, the City may seek dispute resolution pursuant
4 to Section XIX (Dispute Resolution), Paragraph 85 (Record Review). The SOW and/or
5 related work plans shall be modified in accordance with final resolution of the dispute.
6

7 f. The City shall implement any work required by any modifications
8 incorporated in the SOW and/or in work plans developed pursuant to the SOW in
9 accordance with this Paragraph.

10 g. Nothing in this Paragraph shall be construed to limit EPA's or
11 DTSC's authority to require performance of further response actions as otherwise provided
12 in this Consent Decree.
13

14 18. The Parties acknowledge and agree that nothing in this Consent Decree, the
15 SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or
16 representation of any kind by EPA or DTSC that compliance with the work requirements
17 set forth in this Consent Decree, the SOW and the Work Plans will achieve the
18 Performance Standards. The Parties believe that the performance of the Work will help
19 reduce the risk of public exposure to the groundwater contamination and reduce and
20 inhibit the spread of groundwater contamination from its current locations at the Site.
21

22 19. The City shall, prior to any off-Site shipment of Waste Material from the
23 Site to an out-of-state waste management facility, provide written notification to the
24 appropriate state environmental official in the receiving facility's state and to the EPA and
25 DTSC Project Coordinators of such shipment of Waste Material. However, this
26 notification requirement shall not apply to any off-Site shipments when the total volume of
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1 all such shipments will not exceed 10 (ten) cubic yards.

2 a. The City shall include in the written notification the following
3 information, where available: (1) the name and location of the facility to which the Waste
4 Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3)
5 the expected schedule for the shipment of the Waste Material; and (4) the method of
6 transportation. The City shall notify the state in which the planned receiving facility is
7 located of major changes in the shipment plan, such as a decision to ship the Waste
8 Material to another facility within the same state, or to a facility in another state.
9

10 b. The identity of the receiving facility and state will be determined by
11 the City at least 30 (thirty) days prior to shipment. The City shall provide the information
12 required by Paragraph 19.a as soon as practicable after the award of the contract and
13 before the Waste Material is actually shipped.
14

15 VII. REMEDY REVIEW

16 20. Periodic Review. The City shall conduct any studies and investigations as
17 requested by EPA, in order to permit EPA to conduct reviews of whether the Interim
18 Remedial Actions are protective of human health and the environment, at least every 5
19 (five) years as required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any
20 applicable regulations. EPA and the City will seek to avoid duplicative sampling and
21 laboratory work, and to the extent feasible, will seek to consolidate the five-year reviews
22 of the Newmark and Muscody OUs.
23

24 21. EPA Selection of Further Response Actions. If EPA determines, at any
25 time, that the Interim Remedial Actions are not protective of human health and the
26 environment, EPA may select further response actions for the Site in accordance with the
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1 requirements of CERCLA and the NCP.

2 22. Opportunity To Comment. The Parties and, if required by Sections
3 113(k)(2) or 117 of CERCLA, 42 U.S.C. §§ 9613(k)(2), 9617, the public, will be provided
4 with an opportunity to comment on any further response actions proposed by EPA as a
5 result of the review conducted pursuant to Section 121(c) of CERCLA , 42 U.S.C.
6 § 9621(c), and to submit written comments for the record during the comment period.
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8 VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

9 23. Samples taken within the Newmark and Muscoy treatment systems for
10 ongoing process control purposes and for the purpose of complying with Department of
11 Health Services permits or equivalent state authorizations shall comply with the
12 procedures, including QA/QC procedures, referenced in the permits and any additional
13 procedures required pursuant to the SOW. The City shall use quality assurance, quality
14 control, and chain of custody procedures for all other treatability, design, compliance and
15 monitoring samples in accordance with "EPA Requirements for Quality Assurance Project
16 Plans for Environmental Data Operation," (EPA QA/R5); "Preparing Perfect Project
17 Plans," (EPA /600/9-88/087), and subsequent amendments to such guidelines. Amended
18 guidelines shall apply only to procedures conducted after such notification. Prior to the
19 commencement of any monitoring project under this Consent Decree, the City shall submit
20 to EPA for approval, after a reasonable opportunity for review and comment by DTSC, a
21 Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and
22 applicable guidance documents. If relevant to the proceeding, the Parties agree that
23 validated sampling data generated in accordance with the QAPP(s) and reviewed and
24 approved by EPA shall be admissible as evidence, without objection, in any proceeding
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1 under this Consent Decree. The City shall ensure that EPA and DTSC personnel and their
2 authorized representatives are allowed access at reasonable times to all laboratories
3 utilized by the City in implementing this Consent Decree. In addition, the City shall
4 ensure that such laboratories shall analyze all samples submitted by the Lead Oversight
5 Agency pursuant to the QAPP for quality assurance monitoring. The City shall ensure that
6 the laboratories they utilize for the analysis of samples taken pursuant to this Consent
7 Decree perform all analyses according to accepted EPA methods. Accepted EPA methods
8 consist of those methods which are documented in the "Contract Lab Program Statement
9 of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for
10 Organic Analysis," dated February 1988, and any amendments made or applicable thereto
11 during the course of the implementation of this Consent Decree. The City shall ensure that
12 all laboratories the City uses for analysis of samples taken pursuant to this Consent Decree
13 participate in an EPA or EPA-equivalent QA/QC program. The City shall ensure that all
14 field methodologies utilized in collecting samples for subsequent analysis pursuant to this
15 Consent Decree will be conducted in accordance with the procedures set forth in the
16 QAPP approved by EPA.
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20 24. Upon request, the City shall allow split or duplicate samples to be taken by
21 EPA and DTSC or their authorized representatives. Unless shorter notice is agreed by
22 EPA, the City shall notify EPA and DTSC not less than 28 (twenty-eight) days in advance
23 of any sample collection activity, other than ongoing process control sampling and
24 sampling for the purpose of complying with Department of Health Services permits, as to
25 which the City shall provide such notice to EPA and DTSC as specified in the SOW. In
26 addition, EPA and DTSC shall have the right to take any additional samples that EPA or
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1 DTSC deems necessary. Upon request, EPA and DTSC shall allow the City to take split
2 or duplicate samples of any samples they take as part of their oversight of the City
3 implementation of the Work.

4 25. The City shall submit to EPA and DTSC each 2 (two) copies of the results
5 of all sampling and/or tests or other data obtained or generated by or on behalf of the City
6 with respect to the Site and/or the implementation of this Consent Decree unless EPA or
7 DTSC agrees otherwise.
8

9 26. Notwithstanding any provision of this Consent Decree, the United States
10 and DTSC hereby retain all of their information gathering and inspection authorities and
11 rights, including enforcement actions related thereto, under CERCLA, RCRA and any
12 other applicable statutes or regulations.
13

14 IX. ACCESS AND INSTITUTIONAL CONTROLS.

15 27. Groundwater Management and Permit Programs. In order to ensure the
16 effectiveness and integrity of the Interim Remedial Actions, and to implement the ESD,
17 the City shall, within 30 (thirty) days of entry of this Consent Decree:
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19 a. institute a groundwater management program whereby the City
20 shall monitor and, where warranted by the City's best professional judgment, and, if
21 available, the Groundwater Model, in consultation with EPA and DTSC, take appropriate
22 actions to prevent or mitigate (1) the installation and expansion of production wellfields
23 and spreading basins and the re-equipping of existing wells if such wells are located within
24 the City limits in the zone which may affect the effectiveness and integrity of the Interim
25 Remedial Actions ("Permit Zone"), as determined by EPA. If the City objects to EPA's
26 determination of the Permit Zone, the City may seek dispute resolution pursuant to Section
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1 XIX (Dispute Resolution), Paragraph 85 (Record Review); (2) the increase of the annual
2 volume of water spread in the Waterman Canyon, Devil's Canyon, and Badger Canyon
3 spreading basins; and (3) the construction of any new spreading basins within City limits
4 located upgradient of the Newmark and Muscoy treatment systems;

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6 b. initiate the City legislative process for approval and adoption of a
7 groundwater management program consistent with the requirements of Paragraphs 27.c,
8 27.d and 28 that requires specific, advance written approval from the City (which approval
9 shall be based on the City's best professional judgment in consultation with EPA and
10 DTSC) in order to (1) install new wells or to reconstruct existing wells in a manner which
11 increases their capacity if such wells are located within the Permit Zone; (2) increase the
12 annual volume of water spread in the Waterman Canyon, Devil's Canyon, and Badger
13 Canyon spreading basin; or (3) construct any new spreading basins with the City limits
14 located upgradient of the Newmark and Muscoy treatment systems;

15
16 c. submit to EPA a plan proposing to define the Permit Zone and for a
17 well permit program to require applicants for permits to drill new wells or to reconstruct
18 existing wells to increase production capacity to demonstrate and certify, using the
19 Groundwater Model, that the proposed new or reconstructed well, at its maximum
20 production, will not interfere with or adversely affect the integrity of the Newmark and
21 Muscoy extraction and treatment systems, will not increase the likelihood that
22 contaminants will migrate past or around the barrier wells that are part of those systems,
23 and will not otherwise interfere with the performance of the Interim Remedial Actions;
24
25 and
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27 d. submit to EPA a plan for a permit program to regulate the spreading
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1 of water in the spreading basins located within City limits that are upgradient of the
2 Newmark and Muscoy extraction and treatment systems. This program shall address, at a
3 minimum, the spreading basins located at Devil's Canyon, Waterman Canyon and Badger
4 Canyon, and any expansion or replacement of these basins, and any additional basins
5 constructed before the completion of the Work provided for in this Consent Decree. The
6 regulation of spreading activities shall be directed to assuring that any spreading of water
7 in these basins shall not interfere with or adversely affect the integrity of the Newmark and
8 Muscoy Interim Remedial Actions. The permit program will accommodate the use of
9 these basins for flood control purposes in order to protect public safety and to assure
10 proper operation of the City's supply wells and of all treatment systems.
11

12
13 Upon approval by EPA pursuant to Section XI (EPA Approval of Plans and Other
14 Submissions), the City shall implement the permit program.

15 28. In addition to the above-described conditions on permit issuance, the City
16 shall condition the issuance of any permit issued under the permit programs described in
17 this Section on the grant of a right for EPA, DTSC and the City, including their contractors
18 and representatives, (1) of access at reasonable times to the wells or spreading basins or
19 related areas for the purpose of verifying compliance with the permit; and (2) upon
20 reasonable notice to inspect and copy documents and records of the operations of the
21 permitted facilities in order to verify compliance with the permit. Nothing in this
22 Paragraph shall limit EPA's or DTSC's respective statutory and regulatory authorities,
23 including, but not limited to, the authority to obtain access to real property.
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26 29. During the period, if any, after adoption of the permit program and before
27 the completion of the adaptation of the Groundwater Model for the permitting program,
28

1 the City may, with the written concurrence of the Lead Oversight Agency, after reasonable
2 opportunity for review and comment by the Support Oversight Agency, issue a permit
3 allowing the re-equipping or installation of a well on the basis of best professional
4 judgment, based on available evidence satisfactory to the Lead and Oversight Agencies
5 and the City, that the proposed re-equipping or installation of the well will not have an
6 adverse effect on the Interim Remedial Actions. During this period, the City also shall
7 continue to implement the groundwater management program described in Paragraph 27.a.
8 Once the groundwater management and permit programs specified in Paragraphs 27.b, c
9 and d, and Paragraph 28 are implemented, the groundwater management program
10 described in Paragraph 27.a may be terminated.
11

12
13 30. The permit programs described in Paragraphs 27 and 28 shall require that,
14 simultaneous with the filing of a permit application or certification, the permit applicant
15 shall provide EPA and DTSC with copies of any such permit application or certification,
16 together with supporting documentation. EPA and DTSC shall also be provided with the
17 City's proposed permit decision and any modeling or other information on which it is
18 based. After receipt of the application or certification and proposed permit decision and
19 all supporting documentation, the Lead and Support Oversight Agencies shall have a
20 minimum of 30 (thirty) days in which to comment to the City in writing upon any such
21 application or certification and the proposed decision, but in no circumstances shall a
22 failure to comment within 30 (thirty) days of receipt of such information, or any other time
23 period be deemed to be concurrence on the part of the Lead and/or Support Agency. If the
24 Lead or Support Oversight Agency objects to a permit application, certification, proposed
25 decision, or to the modeling work or other documentation on which a proposed permit
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1 decision is based, the Lead and/or Support Oversight Agency, as the case may be, and the
2 City shall consult for up to 60 (sixty) days in order to resolve any material differences
3 between or among them over such matters. The City shall not issue a permit over the
4 unresolved objections of the Lead or Support Oversight Agency.

5
6 31. The City shall defend, indemnify, save and hold harmless the United States
7 and DTSC for any claims that result from the institution and/or implementation of the
8 groundwater management or permitting programs as provided in Paragraph 74.b.

9
10 32. If the Site, or any other property where access and/or land/water use
11 restrictions (other than those provided in the permit program in Paragraphs 27-30) are
12 needed to implement this Consent Decree, is owned or controlled by any of the Parties,
13 such Parties shall:

14 a. commencing on the date of lodging of this Consent Decree, provide
15 EPA and DTSC, and their representatives, including their contractors, with access at all
16 reasonable times to the Site, or such other property, for the purpose of conducting any
17 activity related to this Consent Decree including, but not limited to, the following
18 activities:
19

- 20 (1) Monitoring the Work;
- 21 (2) Verifying any data or information submitted to the United
22 States or the State;
- 23 (3) Conducting investigations relating to contamination at or
24 near the Site;
- 25 (4) Obtaining samples;
- 26 (5) Assessing the need for, planning, or implementing additional
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1 response actions at or near the Site;

2 (6) Implementing the Work pursuant to the conditions set forth
3 in this Consent Decree;

4 (7) Inspecting and copying records, operating logs, contracts, or
5 other documents maintained or generated by the Parties or their agents, consistent
6 with Section XXIV (Access to Information);

7 (8) Assessing the Parties' compliance with this Consent Decree;
8 and
9

10 (9) Determining whether the Site or other property is being used
11 in a manner that is prohibited or restricted, or that may need to be prohibited or
12 restricted, by or pursuant to this Consent Decree;

13
14 b. Commencing on the date of lodging of this Consent Decree, refrain
15 from using the Site, or such other property, in any manner that would interfere with or
16 adversely affect the integrity or protectiveness of the remedial measures to be implemented
17 pursuant to this Consent Decree. Such restrictions may include, but are not limited to,
18 refraining from installing or operating production wellfields or spreading basins in a
19 manner that would interfere with the effectiveness of the Newmark or Muscoy OU
20 extraction and treatment systems.

21
22 c. Within 90 (ninety) days of EPA's written request specifying the
23 property, restrictions, access or easements sought, execute and record in the Recorder's
24 Office of San Bernardino County, State of California, an easement, running with the land,
25 that (i) grants a right of access for the purpose of conducting any activity related to this
26 Consent Decree including, but not limited to, those activities listed in Paragraphs 32.a,
27

1 33.a, 33.c of this Consent Decree, and (ii) grants the right to enforce the land/water use
2 restrictions listed in Paragraphs 32.b, 33.c of this Consent Decree, or other restrictions that
3 EPA determines are necessary to implement, ensure non-interference with, or ensure the
4 protectiveness of the remedial measures to be performed pursuant to this Consent Decree.
5 Such Parties shall grant the access rights and the rights to enforce the land/water use
6 restrictions to one or more of the following persons: (i) the United States and its
7 representatives, (ii) DTSC and its representatives, (iii) the City and its representatives, as
8 applicable, and/or (iv) other appropriate grantees. Such Parties shall, within 45 (forty-five)
9 days of entry of this Consent Decree, submit to EPA for review and approval with respect
10 to such property:
11

12
13 (1) A draft easement, in substantially the form attached hereto
14 as Appendix F, that is enforceable under the laws of the State of California, free
15 and clear of all prior liens and encumbrances (except as approved by EPA), and
16 acceptable under the Attorney General's Title Regulations promulgated pursuant to
17 40 U.S.C. § 255; and
18

19 (2) a current title commitment or report prepared in accordance
20 with the U.S. Department of Justice Title Standards (2001) (the "Standards").

21 Within 15 (fifteen) days of EPA's approval and acceptance of the easement, such Parties
22 shall update the title search and, if it is determined that nothing has occurred since the
23 effective date of the commitment or report to affect the title adversely, record the easement
24 with the Recorder's Office of San Bernardino County. Within 30 (thirty) days of recording
25 the easement, such Parties shall provide EPA with final title evidence acceptable under the
26 Standards, and a conformed copy of the original recorded easement showing the clerk's
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1 recording stamps. The City shall not be obliged to record easements relating to water
2 pipelines under public streets.

3 33. If the Site, or any other property where access and/or land/water use
4 restrictions are needed to implement this Consent Decree (other than those provided in the
5 permit program in Paragraphs 27-30), is owned or controlled by persons other than any of
6 the Parties, the City shall upon written request from EPA specifying the property,
7 restrictions, access or easements sought, use best efforts to secure from such persons:
8

9 a. an agreement to provide access thereto for the City, as well as for
10 the United States on behalf of EPA, and DTSC, as well as their representatives (including
11 contractors), for the purpose of conducting any activity related to this Consent Decree
12 including, but not limited to, those activities listed in Paragraph 32.a of this Consent
13 Decree;
14

15 b. an agreement, enforceable by the City, the United States and DTSC,
16 to abide by the obligations and restrictions established by Paragraphs 32.b and 32.c of this
17 Consent Decree, or that are otherwise necessary to implement, ensure non-interference
18 with, or ensure the protectiveness of the remedial measures to be performed pursuant to
19 this Consent Decree; and
20

21 c. if EPA so requests, the execution and recordation in the Recorder's
22 Office of San Bernardino County, State of California, of an easement, running with the
23 land, that (i) grants a right of access for the purpose of conducting any activity related to
24 this Consent Decree including, but not limited to, those activities listed in Paragraph 32.a
25 of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions
26 listed in Paragraphs 32.b and 32.c of this Consent Decree, or other restrictions that EPA
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1 determines are necessary to implement, ensure non-interference with, or ensure the
2 protectiveness of the remedial measures to be performed pursuant to this Consent Decree.

3 The access rights and/or rights to enforce land/water use restrictions shall be granted to
4 one or more of the following persons: (i) the United States and its representatives, (ii)
5 DTSC and its representatives, (iii) the City and its representatives, as applicable, and/or
6 (iv) other appropriate grantees. Within 45 (forty-five) days of entry of this Consent
7 Decree, the Party shall submit to EPA for review and approval with respect to such
8 property:
9

10 (1) a draft easement, in substantially the form attached hereto as
11 Appendix F, that is enforceable under the laws of the State of California, free and
12 clear of all prior liens and encumbrances (except as approved by EPA), and
13 acceptable under the Attorney General's Title Regulations promulgated pursuant to
14 40 U.S.C. § 255; and
15

16 (2) a current title commitment or report prepared in accordance
17 with the Standards.
18

19 Within 15 (fifteen) days of EPA's approval and acceptance of the easement, the City shall
20 update the title search and, if it is determined that nothing has occurred since the effective
21 date of the commitment or report to affect the title adversely, the easement shall be
22 recorded with the Recorder's Office of San Bernardino County. Within 30 (thirty) days of
23 the recording of the easement, the City shall provide EPA with final title evidence
24 acceptable under the Standards, and a conformed copy of the original recorded easement
25 showing the clerk's recording stamps. The City shall not be obliged to record easements
26 for water pipelines under public streets.
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28

1 34. For purposes of Paragraphs 32 and 33 of this Consent Decree, "best efforts"
2 includes the payment of reasonable sums of money by the City in consideration of access,
3 access easements, land/water use restrictions, and/or restrictive easements, except that the
4 City shall not be required to pay permittees under Paragraphs 32 and 33 or the County of
5 San Bernardino for such matters if the Lead Oversight Agency determines that such
6 payments are not required. If any access or land/water use restriction agreements required
7 by Paragraphs 32.a, 32.b or 32.c of this Consent Decree are not obtained within 45 (forty-
8 five) days of the date of entry of this Consent Decree, or EPA request, if applicable, or any
9 access easements or restrictive easements required by Paragraph 33 of this Consent Decree
10 are not submitted to EPA in draft form within 45 (forty-five) days of the date of EPA's
11 request for such easements, the City shall promptly notify the United States and DTSC in
12 writing, and shall include in that notification a summary of the steps that the City has
13 taken to attempt to comply with Paragraph 33 of this Consent Decree. The United States
14 or DTSC may, as they deem appropriate, assist the City in obtaining access or land/water
15 use restrictions, either in the form of contractual agreements or in the form of easements
16 running with the land. The City shall reimburse the United States or DTSC in accordance
17 with the procedures in Section XVI (Payments for Response Costs), Paragraph 62.e, for all
18 costs incurred, direct or indirect, by the United States or DTSC in obtaining such access
19 and/or land/water use restrictions including, but not limited to, the cost of attorney time
20 and the amount of monetary consideration paid or just compensation.

21 35. If EPA determines that, in addition to the City groundwater management
22 and permit programs referred to in Paragraphs 27-30, land/water use restrictions in the
23 form of state or local laws, regulations, ordinances or other governmental controls are
24

1 needed to implement the interim remedies selected in the RODs or the institutional
2 controls selected in the ESD, ensure the integrity and protectiveness thereof, or ensure
3 non-interference therewith, the City and DTSC shall use their best efforts to cooperate
4 with EPA's efforts to secure such governmental controls. For the purposes of this
5 Paragraph, "best efforts" shall not include the payment of sums of money to any other
6 governmental entity in consideration of such governmental controls or the indemnification
7 of the United States for actions taken to secure such additional controls.
8

9 36. Notwithstanding any provision of this Consent Decree, the United States
10 and DTSC retain all of their access authorities and rights, as well as all of their rights to
11 require land/water use restrictions, including enforcement authorities related thereto, under
12 CERCLA, RCRA and any other applicable statute or regulation.
13

14 X. REPORTING REQUIREMENTS.

15 37. In addition to any other requirement of this Consent Decree, the City shall
16 submit to EPA and DTSC 3 (three) copies of written progress reports that: (a) describe the
17 actions which have been taken toward achieving compliance with this Consent Decree
18 during the previous month or other reporting period specified in this Paragraph
19 ("Reporting Period"); (b) include a summary of all results of sampling and tests and all
20 other data received or generated by the City or its contractors or agents in the previous
21 Reporting Period; (c) identify all work plans, plans and other deliverables required by this
22 Consent Decree completed and submitted during the previous Reporting Period; (d)
23 describe all actions, including, but not limited to, data collection and implementation of
24 work plans, which are scheduled for the next six weeks, if the Reporting Period is one
25 month, or for the following Reporting Period, if the Reporting Period is a quarter- or half-
26 month, or for the following Reporting Period, if the Reporting Period is a quarter- or half-
27 month, or for the following Reporting Period, if the Reporting Period is a quarter- or half-
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1 year, and provide other information relating to the progress of the Work; (e) include
2 information regarding percentage of completion, unresolved delays encountered or
3 anticipated that may affect the future schedule for implementation of the Work, and a
4 description of efforts made to mitigate those delays or anticipated delays; (f) include any
5 modifications to the work plans or other schedules that the City has proposed to or that
6 have been approved by the Lead Oversight Agency; and (g) describe all activities
7 undertaken in support of the Community Relations Plan during the previous Reporting
8 Period and those to be undertaken in the next six weeks, if the Reporting Period is one
9 month, or during the following Reporting Period, if the Reporting Period is a quarter- or
10 half-year. For the purposes of this Paragraph, data shall be considered "received or
11 generated" after all QA/QC procedures required under this Consent Decree have been
12 completed for such data and the City has physically (including electronically) received the
13 data together with QA/QC documentation for such data. All data including control
14 samples data and their QA/QC documentation shall be reported to the Lead or Support
15 Oversight Agency as detailed in the SOW.

16 The City shall submit these progress reports to EPA and DTSC according to the
17 following schedule; provided that the Lead Oversight Agency with the concurrence of the
18 Support Oversight Agency may establish a different schedule or require more frequent
19 reporting.

20 a. By the last day of the month following the preceding month, for 2
21 (two) years after the Effective Date;

22 b. By the last day of the month following the preceding quarter, for the
23 following five years (i.e. April 10, July 10, October 10 and January 10); and
24

1 c. By the last day of the month following the preceding half-year, for
2 the remaining years of Work (i.e. January 10, July 10).

3 If requested by EPA or DTSC, the City shall also provide briefings for EPA and
4 DTSC to discuss the progress of the Work. Such briefings may be by conference call if
5 permitted by the Lead Oversight Agency.
6

7 38. The City shall notify EPA and DTSC of any change in the schedule
8 described in the progress report for the performance of any activity, including, but not
9 limited to, data collection and implementation of work plans, no later than 7 (seven) days
10 prior to the performance of the activity.
11

12 39. Upon the occurrence of any event during performance of the Work that the
13 City is required to report pursuant to Section 103 of CERCLA or Section 304 of the
14 Emergency Planning and Community Right-to-Know Act ("EPCRA"), the City shall
15 within 24 (twenty-four) hours of the onset of such event orally notify the EPA Project
16 Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of
17 the EPA Project Coordinator), and, in the event that neither the EPA Project Coordinator
18 or Alternate EPA Project Coordinator is available, the Emergency Response Section,
19 Region 9, United States Environmental Protection Agency. The City shall also notify the
20 DTSC Project Coordinator within the same time period. These reporting requirements are
21 in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.
22

23 40. Within 20 (twenty) days of the onset of such an event, the City shall furnish
24 to EPA and DTSC a written report, signed by the City's Project Coordinator, setting forth
25 the events which occurred and the measures taken, and to be taken, in response thereto.
26 Within 30 (thirty) days of the conclusion of such an event, the City shall submit a report
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1 setting forth all actions taken in response thereto.

2 41. The City shall submit 2 (two) copies of all plans, reports, and data required
3 by the SOW or any approved plans to the Lead and Support Oversight Agencies in
4 accordance with the schedules set forth in such plans.

5 42. All reports and other documents submitted by the City to the Lead and
6 Support Oversight Agencies (other than the progress reports referred to above) which
7 purport to document compliance with the terms of this Consent Decree shall be signed by
8 authorized representatives of the City.
9

10 XI. APPROVAL OF PLANS AND OTHER SUBMISSIONS

11 43. After review of any plan, report or other item which is required to be
12 submitted for approval pursuant to this Consent Decree, the Lead Oversight Agency, after
13 a reasonable opportunity for review and comment by the Support Oversight Agency, shall:
14 (a) approve, in whole or in part, the submission; (b) approve the submission upon
15 specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in
16 whole or in part, the submission, directing that the City modify the submission; or (e) any
17 combination of the above. However, the Lead Oversight Agency shall not modify a
18 submission without first providing the City at least one notice of deficiency and an
19 opportunity to cure within 30 (thirty) days, or within another period selected by the Lead
20 Oversight Agency, except where to do so would cause serious disruption to the Work or
21 where previous submission(s) have been disapproved due to material defects and the
22 deficiencies in the submission under consideration indicate a bad faith lack of effort to
23 submit an acceptable deliverable.
24

25 44. In the event of approval, approval upon conditions, or modification by the
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1 Lead Oversight Agency, as applicable, pursuant to Paragraph 43 or 46, the City shall
2 proceed to take any action required by the plan, report, or other item, as approved or
3 modified by the Lead Oversight Agency, subject only to its right to invoke the Dispute
4 Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the
5 modifications or conditions made by the Lead Oversight Agency. In the event that the
6 Lead Oversight Agency modifies the submission to cure the deficiencies pursuant to
7 Paragraph 43 or 46 and the submission has a material defect, EPA and DTSC retain their
8 right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).
9

10 45. Resubmission of Plans.

11 a. Upon receipt of a notice of disapproval pursuant to Paragraph 43,
12 the City shall, within 30 (thirty) days or such longer time as specified by the Lead
13 Oversight Agency in such notice, correct the deficiencies and resubmit the plan, report, or
14 other item for approval. Any stipulated penalties applicable to the submission, as provided
15 in Section XX (Stipulated Penalties), shall accrue during the 30-day (thirty-day) period or
16 otherwise specified period but shall not be payable unless the resubmission is disapproved
17 or modified due to a material defect as provided in Paragraph 47.
18

19 b. Notwithstanding the receipt of a notice of disapproval pursuant to
20 Paragraph 43, the City shall proceed, at the direction of the Lead Oversight Agency, to
21 take any action required by any non-deficient portion of the submission. Implementation
22 of any non-deficient portion of a submission shall not relieve the City of any liability for
23 stipulated penalties under Section XX (Stipulated Penalties).
24

25 46. In the event that a resubmitted plan, report or other item, or portion thereof,
26 is disapproved by the Lead Oversight Agency, the Lead Oversight Agency may again
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1 require the City to correct the deficiencies, in accordance with the preceding Paragraphs.
2 The Lead Oversight Agency also retains the right to modify or develop the plan, report or
3 other item. The City shall implement any such plan, report, or item as modified or
4 developed by the Lead Oversight Agency, subject only to its right to invoke the procedures
5 set forth in Section XIX (Dispute Resolution).
6

7 47. If upon resubmission, a plan, report, or item is disapproved or modified by
8 the Lead Oversight Agency due to a material defect, the City shall be deemed to have
9 failed to submit such plan, report, or item timely and adequately unless the City invokes
10 the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and the
11 Lead Oversight Agency's action is overturned pursuant to that Section. The provisions of
12 Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the
13 implementation of the Work and accrual and payment of any stipulated penalties during
14 Dispute Resolution. If the Lead Oversight Agency's disapproval or modification is upheld,
15 stipulated penalties shall accrue for such violation from the date on which the initial
16 submission was originally required, as provided in Section XX (Stipulated Penalties).
17

18 48. All plans, reports, and other items required to be submitted to the Lead
19 Oversight Agency under this Consent Decree shall, upon approval or modification by the
20 Lead Oversight Agency, be enforceable under this Consent Decree. In the event the Lead
21 Oversight Agency approves or modifies a portion of a plan, report, or other item required
22 to be submitted under this Consent Decree, the approved or modified portion shall be
23 enforceable under this Consent Decree.
24
25

26 XII. PROJECT MANAGERS

27 49. Within 20 (twenty) days of lodging this Consent Decree, the City, DTSC
28

1 and EPA will notify each other, in writing, of the name, address and telephone number of
2 their respective designated Project Coordinators and Alternate Project Coordinators,
3 unless such designation and notification has been made prior to entry of this Consent
4 Decree. If a Project Coordinator or Alternate Project Coordinator initially designated is
5 changed, the identity of the successor will be given to the other Parties at least 5 (five)
6 working days before the changes occur, unless impracticable, but in no event later than the
7 actual day the change is made. The City's Project Coordinators shall be subject to
8 disapproval by EPA and shall have the technical expertise sufficient to adequately oversee
9 all aspects of the Work. The City's Project Coordinators may include the Manager and
10 Deputy General Manager of the City's Municipal Water Department, but shall not be City
11 or non-City employees who are attorneys for the City. He or she may assign other
12 representatives, including contractors, to serve as Site representatives for oversight of
13 performance of daily operations.
14

15
16 50. The United States or DTSC may designate other representatives, including,
17 but not limited to, EPA and DTSC employees, and federal and DTSC contractors and
18 consultants, to observe and monitor the progress of any activity undertaken pursuant to
19 this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall
20 have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-
21 Scene Coordinator ("OSC") by the NCP, 40 C.F.R. Part 300. In addition, EPA's Project
22 Coordinator or Alternate Project Coordinator shall have authority, consistent with the
23 NCP, to halt any Work required by this Consent Decree and to take any necessary response
24 action when s/he determines that conditions at the Site constitute an emergency situation
25 or may present an immediate threat to public health or welfare or the environment due to
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1 release or threatened release of Waste Material.

2 51. The Parties' Project Coordinators will meet, at a minimum, on a monthly
3 basis or other basis as determined by the Lead Oversight Agency.

4 XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

5
6 52. Within 60 (sixty) days of entry of this Consent Decree, or within 10 (ten)
7 days of the United States' payment of the amounts provided in Section XVI of this
8 Consent Decree (Payments of Response Costs), whichever is later, the City shall establish
9 and maintain financial security for the O&M and the Site-wide Monitoring in the form of
10 the O&M Escrow, and for the construction the City has agreed to perform in the form of
11 the Construction Escrow, using the funds provided by the United States.

12
13 53. With respect to the other work that the City agrees in this Consent Decree
14 to perform, including but not limited to payment of DTSC's oversight costs, as described
15 in Paragraph 14, within 30 (thirty) days of entry of this Consent Decree, the City shall
16 establish and maintain financial security in the amount of \$ 3 million (three million
17 dollars) in one or more of the following forms:

- 18
19 a. A surety bond guaranteeing performance of the work;
20 b. One or more irrevocable letters of credit equaling the total estimated
21 cost of the work;
22 c. A demonstration that the City satisfies the requirements of 40
23 C.F.R. Part 264.143(f); or
24 d. Another method proposed by the City and approved by EPA. Such
25 method may include a program in which the City shall adopt water rates, through
26 procedures compliant with applicable California law, that assure that the City has
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1 sufficient revenue from water rate-payers to pay for the estimated costs in each upcoming
2 City fiscal year of the following items:

3 (1) All required debt service on the Municipal Water Department's
4 financial obligations, including bonds, required by bond covenants or similar undertakings
5 to be serviced by the Municipal Water Department's water rate revenue;
6

7 (2) All operating and maintenance expenses for the City and DTSC
8 treatment systems, including but not limited to electrical costs, labor costs, cost of
9 supplies, materials, and outside vendor costs to operate and maintain such treatment
10 systems, and departmental overhead, and any anticipated Oversight Costs; and
11

12 (3) All other projected operating and capital expenses for the
13 Municipal Water Department, other than those lawfully subject to reimbursement under
14 the O&M Escrow, the Construction Escrow, or under other lawful and identified sources
15 of reimbursement.

16 Under such a program, the City shall annually certify to EPA and DTSC that the water
17 rates are sufficient to pay for all such obligations. Such certification shall include
18 documentation of the debts and expenses in Paragraph 53.d and the calculation of
19 revenues. If the City is unable to certify that the water rates are sufficient, the City shall
20 initiate appropriate rate-making proceedings to assure adequate funds are available to pay
21 for those of the City's obligations under this Consent Decree that are not subject to
22 reimbursement by the O&M or Construction Escrows or under other lawful and identified
23 sources of reimbursement, or provide to EPA another form of approved financial
24 assurance as described in this Paragraph.
25

26
27 54. In the event that EPA, after a reasonable opportunity for review and
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1 comment by DTSC, determines at any time that the financial assurances provided pursuant
2 to this Section are inadequate, the City shall, within 60 (sixty) days of receipt of notice of
3 EPA's determination, obtain and present to EPA for approval one of the other forms of
4 financial assurance listed in the preceding Paragraph of this Consent Decree. The City's
5 inability to demonstrate financial ability to complete the Work or the work described in the
6 preceding Paragraph shall not excuse performance of any activities required under this
7 Consent Decree.
8

9 55. If the City can show that the estimated cost to complete the remaining work
10 under Paragraph 53 has diminished below the amount set forth in Paragraph 53 after entry
11 of this Consent Decree, the City may, on any anniversary date of entry of this Consent
12 Decree, or at any other time agreed to by EPA in its unreviewable discretion, seek to
13 reduce the amount of the financial security provided under this Section to the estimated
14 cost of the remaining work to be performed. The City shall submit a proposal for such
15 reduction to the Lead Oversight Agency, in accordance with the requirements of this
16 Section, and may reduce the amount of the security upon approval by the Lead Oversight
17 Agency with the concurrence of the Support Oversight Agency. In the event of a dispute,
18 the City may reduce the amount of the security in accordance with the final administrative
19 or judicial decision resolving the dispute.
20
21

22 56. The City may change the form of financial assurance provided under this
23 Section at any time, upon notice to and approval by EPA, provided that the new form of
24 assurance meets the requirements of this Section. In the event of a dispute, the City may
25 change the form of the financial assurance only in accordance with the final administrative
26 or judicial decision resolving the dispute.
27
28

1 XIV. CERTIFICATION OR NOTICE OF COMPLETION

2 57. Completion of the Work

3 a. EPA, after reasonable opportunity for review and comment by
4 DTSC, may require the City, upon 30 (thirty) days' notice, to initiate the Certification of
5 Completion process for an OU or Site-wide Monitoring if EPA believes that the Work has
6 been fully performed for that OU or Site-wide Monitoring.
7

8 b. Within 90 (ninety) days after the City concludes that the Work for
9 (1) the Newmark OU, (2) the Muscoy OU, or (3) the Site-wide Monitoring has been fully
10 performed, or within 120 (one hundred and twenty) days after EPA requires initiation of
11 the Certification of Completion process pursuant to Paragraph 57.a, the City shall schedule
12 and conduct a pre-certification inspection for each such phase of the Work. EPA, DTSC
13 and USACE shall be invited to attend. Unless certified or terminated earlier by EPA, each
14 such phase of the Work will be completed after the City has performed for (1) fifty years
15 after October 1, 2000, with respect to O&M of the Newmark OU, (2) 50 (fifty) years after
16 the Muscoy OU is determined by EPA to be operational and functional pursuant to 40
17 C.F.R. § 300.435(f)(2), with respect to O&M of the Muscoy OU, and (3) 50 (fifty) years
18 after the Muscoy OU is determined by EPA to be operational and functional pursuant to 40
19 C.F.R. § 300.435(f)(2), with respect to the Site-wide Monitoring. If any EPA ROD
20 requires performance of such activities for longer than the times specified in this
21 Paragraph, the City's obligations under this Consent Decree shall be complete after the
22 City has performed for the times specified in this Paragraph. If any EPA ROD provides
23 that these activities are complete or may be ceased in lesser time frames than are specified
24 in this Paragraph, the City may apply for a Certification of Completion of each phase of
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1 the Work in accordance with the requirements of such ROD.

2 c. Where the City has initiated the Certification of Completion process
3 pursuant to Paragraph 57.b, if, after the pre-certification inspection, the City believes that
4 the Work or relevant phase of the Work has been fully performed, the City shall submit a
5 written report by a registered professional engineer stating that the subject Work has been
6 completed in full satisfaction of the requirements of this Consent Decree. If EPA has
7 initiated the Certification of Completion process pursuant to Paragraph 57.a, after the pre-
8 certification inspection, the City shall submit a written report by a registered professional
9 engineer stating whether the City believes that the Work or relevant phase of the Work has
10 been fully performed and completed in full satisfaction of the requirements of this Consent
11 Decree. Such reports shall contain the following statement, signed by a responsible
12 government official:
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15 To the best of my knowledge, after thorough investigation, I certify that the
16 information contained in or accompanying this submission is true, accurate
17 and complete. I am aware that there are significant penalties for submitting
18 false information, including the possibility of fine and imprisonment for
19 knowing violations.

20 If, after review of the written report, EPA, after reasonable opportunity to review and
21 comment by DTSC, determines that any portion of the Work has not been completed in
22 accordance with this Consent Decree, EPA will notify the City in writing of the activities
23 that must be undertaken by the City pursuant to this Consent Decree to complete the
24 Work. Provided, however, that EPA may only require the City to perform such activities
25 pursuant to this Paragraph to the extent that such activities are consistent with the "scope
26 of the interim remedies selected in the RODs and the ESD," as that term is defined in
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1 Paragraph 17. EPA will set forth in the notice a schedule for performance of such
2 activities consistent with this Consent Decree and the SOW or require the City to submit a
3 schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other
4 Submissions). The City shall perform all activities described in the notice in accordance
5 with the specifications and schedules established therein, subject to its right to invoke the
6 dispute resolution procedures set forth in Section XIX (Dispute Resolution).
7

8 d. If EPA concludes, based on the initial or any subsequent request for
9 Certification of Completion by the City, and after a reasonable opportunity for review and
10 comment by DTSC, that the Work or a phase of the Work has been performed in
11 accordance with this Consent Decree, EPA will so notify the City in writing (Certification
12 of Completion).
13

14 e. If EPA otherwise concludes, and after a reasonable opportunity for
15 review and comment by DTSC, that the Work or a phase of the Work has been performed
16 in accordance with this Consent Decree, EPA will so notify the City in writing (Notice of
17 Completion). EPA may make such notification notwithstanding whether the City has
18 initiated or EPA has required the City to initiate the Certification of Completion process.
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20 XV. EMERGENCY RESPONSE

21 58. In the event of any action or occurrence during the performance of the
22 Work which causes or threatens a release of Waste Material from the Site that constitutes
23 an emergency situation or may present an immediate threat to public health or welfare or
24 the environment, the City shall, subject to Paragraph 59, immediately take all appropriate
25 action to prevent, abate, or minimize such release or threat of release, and shall
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1 immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is
2 unavailable, EPA's Alternate Project Coordinator, and DTSC's Project Coordinator. If
3 neither of the EPA personnel is available, the City shall notify the EPA Emergency
4 Response Unit, Region 9. The City shall take such actions in consultation with EPA's
5 Project Coordinator, or other available authorized EPA or DTSC official and in
6 accordance with all applicable provisions of the Health and Safety Plans, the Contingency
7 Plans, and any other applicable plans or documents developed pursuant to the SOW. In
8 the event that the City fails to take appropriate response action as required by this Section,
9 and EPA or another department of the United States, and/or DTSC takes such action
10 instead, the City shall reimburse the United States and DTSC for all costs of the response
11 action not inconsistent with the NCP pursuant to Section XVI (Payments for Response
12 Costs), Paragraphs 62.e and/or 65. The City may use funds from the O&M Escrow to
13 make such reimbursement.
14

15
16 59. Nothing in the preceding Paragraph or in this Consent Decree shall be
17 deemed to limit any authority of the United States, or DTSC, (a) to take all appropriate
18 action to protect human health and the environment or to prevent, abate, respond to, or
19 minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b)
20 to direct or order such action, or seek an order from the Court, to protect human health and
21 the environment or to prevent, abate, respond to, or minimize an actual or threatened
22 release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not
23 to Sue by United States and DTSC).
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XVI. PAYMENTS FOR RESPONSE COSTS.

60. Payments by Settling Federal Agencies for Past and Future Response Costs.

a. Payments by United States on Behalf of Settling Federal Agencies

(1) Immediately upon approval by the Court of this Consent Decree, the City will provide electronic funds transfer information sufficient to allow the United States to make the payments provided in this Paragraph.

(2) The United States, on behalf of the Settling Federal Agencies, shall pay the amount of \$59,000,000 (fifty-nine million dollars) into the O&M Escrow within 90 (ninety) days after the Effective Date or upon establishment of the O&M Escrow, whichever is later. The amount paid into the O&M Escrow shall be retained and used by the City in accordance with Paragraph 14 of this Consent Decree. Any amount remaining in the O&M Escrow after the earlier of (a) the expiration of all time limits described in Paragraph 14.a.1(b)-(e); (b) the final Certification of Completion pursuant to Section XIV (Certification or Notice of Completion), Paragraph 57.d; or (c) the final Notice of Completion by EPA pursuant to Paragraph 57.e; shall be disbursed to the City and to the Future Cost Account on a 50/50 basis. Until such time as the United States funds the O&M Escrow, the City shall be entitled to seek reimbursement for O&M Escrow-covered costs from the Cooperative Agreement; provided, however, that the City shall reimburse EPA for any such disbursements during such time upon funding of the O&M Escrow.

(3) The United States, on behalf of the Settling Federal

1 Agencies, shall pay to EPA the amount of \$6,500,000 (six and one-half million
2 dollars) within 90 (ninety) days after the Effective Date. Amounts paid to EPA in
3 accordance with this Paragraph shall be deposited into the Future Cost Account
4 and shall be retained and used to conduct or finance response actions at or in
5 connection with the Site, or transferred by EPA to another special account for the
6 Site, or to the EPA Hazardous Substance Superfund.
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8 (4) The United States, on behalf of the Settling Federal
9 Agencies, shall pay to DTSC the amount of \$3,000,000 (three million dollars)
10 within 90 (ninety) days after the Effective Date.
11

12 (5) The United States, on behalf of the Settling Federal
13 Agencies, shall pay into the Construction Escrow the amount of \$10,000,000 (ten
14 million dollars) within 90 (ninety) days after the Effective Date or upon
15 establishment of the Construction Escrow, whichever is later. The amount paid to
16 the Construction Escrow shall be (i) retained and used by the City to pay for
17 construction of additional City treatment plants and directly related transmission
18 systems to expand the City's ability to provide potable water to its residents as set
19 forth in Appendix G to this Consent Decree; and (ii) to complete construction of
20 the Muscoy OU extraction system. Any amount remaining in the Construction
21 Escrow after the earlier of the last Certification of Completion pursuant to Section
22 XIV (Certification or Notice of Completion) or the last Notice of Completion by
23 EPA pursuant to Paragraph 57.e shall be disbursed to the City and to the Future
24 Cost Account on a 50/50 basis.
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1 (6) Except for up to \$1,000,000 one million dollars NPV, which
2 may be used by the City to implement the requirements of Paragraphs 32 and 33,
3 and to develop, update and maintain the Groundwater Model, in accordance with
4 the City's obligations under Paragraph 14.c.(1), no funds paid by or on behalf of
5 the Settling Federal Agencies to the O&M or Construction Escrows pursuant to
6 this Consent Decree shall be used to pay attorneys' fees, expert witness costs, or
7 other litigation costs or fees.
8

9 b. The Settling Federal Agencies' obligations under this Consent Decree
10 shall be satisfied upon such payments by the United States, on behalf of the Settling
11 Federal Agencies, provided in Paragraph 60.a. If the required payments are not made
12 within 90 (ninety) days after the Effective Date or as otherwise provided in this Paragraph,
13 EPA and the Department of Justice shall resolve the issue within 30 (thirty) days in
14 accordance with the letter agreement dated December 28, 1998. Payment of such funds
15 shall not be considered a fine, penalty or monetary sanction. If a required payment for the
16 Settling Federal Agencies is not made within 90 (ninety) days of entry of this Consent
17 Decree, then the unpaid balance shall accrue Interest from the date 90 (ninety) days after
18 the date of entry until the date the City, DTSC or EPA, as the case may be, actually
19 receives the federal payment.
20
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22 c. The City's audit responsibilities for use of the Escrow Funds shall be
23 governed by OMB Circular A-133. The City shall cause the use of the Escrow Funds to be
24 audited annually as a major program within the meaning of, and according to the standards
25 and procedures of, OMB Circular A-133 or a comparable, minimum standard in any
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1 successor document. That audit shall assure, among other things, that the money is
2 invested as provided in the attached guaranteed investment contract (Appendix G), and
3 that the proceeds of that investment and the principal sum are spent for the permitted
4 purposes under this Consent Decree. A separate report concerning such expenditures and
5 their compliance with this Consent Decree shall be prepared annually by the auditors and
6 provided to the City, and the Lead and Support Oversight Agencies.
7

8 d. The United States' payments to DTSC shall be made in accordance
9 with the procedures in Paragraph 65 or in accordance with Electronic Funds Transfer
10 instructions provided by DTSC.
11

12 61. Anti-Deficiency Act The Parties to this Consent Decree recognize and
13 acknowledge that the payment obligations of the United States pursuant to this Consent
14 Decree can only be paid from appropriated funds legally available for such purpose.
15 Nothing in this Consent Decree shall be interpreted or construed as a commitment or
16 requirement that the United States obligate or pay funds in contravention of the Anti-
17 Deficiency Act, 31 U.S.C. §§ 1301, 1341, or any other applicable provision of law.
18

19 62. Payment by the City for Extraordinary Costs and Other Payments

20 a. The City shall pay to the United States all Extraordinary Costs and
21 other payments required by this Consent Decree. On a periodic basis the United States
22 will send the City a bill requiring payment of Extraordinary Costs that includes a SCORES
23 (which stands for "Superfund Cost Organization and Recovery Enhancement System") or
24 other regionally-prepared standard cost summary that includes direct and indirect costs
25 incurred by EPA and its contractors for Future U.S. Response Costs and Extraordinary
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1 Costs. In addition to the cost summary, EPA shall provide with each bill an explanation of
2 its allocation of costs between Future U.S. Response Costs and Extraordinary Costs or
3 other payments required by the bill. The City shall make all payments identified by EPA
4 as Extraordinary Costs or other payments required by the bill within 60 (sixty) days of the
5 City's receipt of each bill requiring payment, except as otherwise provided in Paragraphs
6 66 and 109.
7

8 b. EPA has already obligated \$ 6,249,000 of appropriated money
9 under the Cooperative Agreement for the City to complete the construction of the Muscoy
10 extraction system, as that City commitment is defined in Paragraph 14.e of this Consent
11 Decree. In the event EPA pays the City more than \$6,249,000 under the Cooperative
12 Agreement for the City to construct the Muscoy extraction system, the City shall
13 reimburse EPA such additional amount within thirty (30) days of the City's receipt of a
14 bill requiring payment of such costs. EPA shall not seek reimbursement of such amounts
15 until after the Construction Escrow has been funded.
16

17 c. In the event that the City has sought and been reimbursed by EPA
18 pursuant to the Cooperative Agreement for O&M on the Newmark or Muscoy OU or the
19 Site-wide Monitoring, the City shall reimburse EPA for such sums previously paid to the
20 City pursuant to the Cooperative Agreement. The City has sought and been reimbursed by
21 EPA for O&M on the Newmark OU since October 1, 2000. EPA shall not seek
22 reimbursement for such amounts until after the O&M Escrow has been funded.
23

24 d. In the event that EPA is required to pay for obligations of the City
25 that are not reimbursed under this Consent Decree or that exceed the limits of the escrows
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1 established pursuant to this Consent Decree, the City shall reimburse EPA for such costs.

2 e. The City shall make all payments required by this Paragraph by a
3 check made payable to "EPA Hazardous Substance Superfund," referencing the name and
4 address of the party making the payment, EPA Site/Spill ID Number 09J5, and DOJ Case
5 Number 90-11-3-06902/1. The City shall send the check(s) to:
6

7 U.S. Environmental Protection Agency
8 Region IX, Attn: Superfund Accounting
9 P.O. Box 360863M
10 Pittsburgh, PA 15251
11 Attn: David Wood

12 Amounts paid to EPA in accordance with this Paragraph shall be deposited into the Future
13 Cost Account and shall be retained and used to conduct or finance response actions at or in
14 connection with the Site, or transferred by EPA to the EPA Hazardous Substance
15 Superfund.

16 63. At the time of payment, the City shall send notice that payment has been
17 made to the United States, to EPA and to the Regional Financial Management Officer, in
18 accordance with Section XXVI (Notices and Submissions).

19 64. Amounts paid to EPA by the City in accordance with this Section shall be
20 deposited into the Future Cost Account and shall be retained and used to conduct or
21 finance response actions at or in connection with the Site, or transferred by EPA to the
22 EPA Hazardous Substance Superfund.

23 65. The City shall reimburse DTSC for all Oversight Costs not inconsistent
24 with the NCP up to \$900,000 (nine hundred thousand dollars). DTSC will send the City a
25 bill requiring payment that includes a standard DTSC-prepared cost summary that
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1 includes direct and indirect costs incurred by DTSC and its contractors for Oversight Costs
2 on a periodic basis. The City shall make all payments within 90 (ninety) days of the City's
3 receipt of each bill requiring payment, except as otherwise provided in Paragraphs 66 and
4 109. All payments to DTSC required by this Consent Decree shall be made by check,
5 payable to Cashier, Department of Toxic Substances Control, and accompanied by a
6 transmittal letter referencing the Newmark Superfund Site, Project Code No. 400259, and
7 shall be forwarded to:
8

9 Cashier, Department of Toxic Substances Control
10 1001 'T' Street, 4th Floor
11 P.O. Box 806
12 Sacramento, California 95814-0806

13 66. The City may contest payment of any Oversight Costs or Extraordinary
14 Costs if the City determines that the United States or DTSC has made an accounting error,
15 if the applicable cap on Oversight Costs has been exceeded, or if the City alleges that a
16 cost item that is included represents costs that are inconsistent with the NCP, or with
17 respect to DTSC costs, other applicable state law. The City may request the underlying
18 documentation only for charges incurred by DTSC, provided that such request shall not be
19 cause for the City to delay payment to the United States or DTSC or to delay initiation of
20 the dispute resolution procedures and satisfaction of the other requirements described in
21 this Paragraph. Any objection shall be made in writing within 30 (thirty) days of receipt of
22 the bill and must be sent to the United States (if the United States' accounting is being
23 disputed) or DTSC (if DTSC's accounting is being disputed) pursuant to Section XXVI
24 (Notices and Submissions). Any such objection shall specifically identify the contested
25 Oversight Costs or Extraordinary Costs and the basis for objection. In the event of an
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1 objection, the City shall within the 30 (thirty) day period pay all uncontested Oversight and
2 Extraordinary Costs to the United States or DTSC in the manner described in Paragraphs
3 62.e and 65. Simultaneously, the City shall establish an interest-bearing escrow account in
4 a federally-insured bank duly chartered in the State of California and remit to that escrow
5 account funds equivalent to the amount of the contested Oversight Costs or Extraordinary
6 Costs. The City shall send to the United States, as provided in Section XXVI (Notices and
7 Submissions), and DTSC a copy of the transmittal letter and check paying the uncontested
8 Oversight Costs or Extraordinary Response Costs, and a copy of the correspondence that
9 establishes and funds the escrow account, including, but not limited to, information
10 containing the identity of the bank and bank account under which the escrow account is
11 established as well as a bank statement showing the initial balance of the escrow account.
12
13 Simultaneously with establishment of the escrow account, the City shall initiate the
14 dispute resolution procedures in Section XIX (Dispute Resolution). If the United States or
15 DTSC prevails in the dispute, within 10 (ten) days of the resolution of the dispute, the City
16 shall pay the sums due (with accrued interest) to the United States, if the United States
17 costs are disputed, or DTSC, if DTSC costs are disputed, in the manner described in
18 Paragraph 62.e or 65. If the City prevails concerning any aspect of the contested costs, the
19 City shall pay that portion of the costs (plus associated accrued interest) for which it did
20 not prevail to the United States, if the United States costs are disputed, or DTSC, if DTSC
21 costs are disputed, in the manner described in Paragraph 62.e or 65; the City shall be
22 disbursed any balance of the escrow account. The dispute resolution procedures set forth
23 in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute
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1 Resolution) shall be the exclusive mechanisms for resolving disputes regarding the City's
2 obligation to reimburse the United States and DTSC for their Oversight or Extraordinary
3 Costs.

4 67. In the event that the payments required by Paragraphs 62.e and 65 are not
5 made within 60 (sixty) and 90 (ninety) days, respectively, of the City's receipt of the bill,
6 the City shall pay Interest on the unpaid balance, except that the City shall not be obliged
7 to pay Interest with respect to any costs which it contested and with respect to which it has
8 prevailed pursuant to the preceding Paragraph and the Dispute Resolution procedures
9 under this Consent Decree. The Interest to be paid on costs under this Paragraph shall
10 begin to accrue on the date of the bill. The Interest shall accrue through the date of the
11 City's payment. Payments of Interest made under this Paragraph shall be in addition to
12 such other remedies or sanctions available to the United States and DTSC by virtue of the
13 City's failure to make timely payments under this Section including, but not limited to,
14 payment of stipulated penalties. The City shall make all payments required by this
15 Paragraph in the manner described in Paragraphs 62.e and 65.
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XVII. INDEMNIFICATION AND INSURANCE.

74. The City's Indemnification of the United States and DTSC.

a. The United States and DTSC do not assume any liability by entering into this agreement or by virtue of any designation of the City as EPA's or DTSC's authorized representatives under Section 104(e) of CERCLA. With respect to the Work for which the City is responsible, the City shall indemnify, save and hold harmless the United States, DTSC, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of the City, as applicable, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of the City as EPA's or DTSC's authorized representatives under Section 104(e) of CERCLA. Further, the City agrees to pay the United States as Extraordinary Costs and DTSC as costs not included in State Oversight Costs all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or DTSC based on negligent or other wrongful acts or omissions of the City, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under their control, in carrying out activities pursuant to this Consent Decree. Neither the United States nor DTSC shall be held out as a party to any contract entered into by or on behalf of the City in carrying out activities pursuant to this Consent Decree. The City and its contractors shall not be

1 considered agents of the United States or DTSC.

2 b. The United States and DTSC do not assume any liability for the
3 groundwater management and permitting program described in Paragraphs 27-30. The
4 City shall defend, indemnify, save and hold harmless the United States and DTSC against
5 all claims or causes of action arising from or on account of the acts or omissions of the
6 City, as applicable, its officers, directors, employees, agents, contractors, subcontractors,
7 and any persons acting on their behalf or under their control, in carrying out the
8 groundwater management and permitting program, including but not limited to claims that
9 the programs or Groundwater Model are illegal, invalid, or constitute a taking of property
10 without just compensation. The City's obligation to indemnify the United States pursuant
11 to this Paragraph 74.b shall be limited to \$ 12,000,000 (twelve million dollars) NPV on the
12 date of entry of this Consent Decree. The City's obligation to indemnify DTSC pursuant
13 to this Paragraph 74.b shall be limited to \$ 12,000,000 (twelve million dollars). The
14 United States and DTSC shall cooperate in the defense of any such claim, and shall bear
15 their own intramural costs of such cooperation (e.g., EPA and DOJ employee
16 compensation and related costs), and in the case of DTSC, California Department of
17 Justice intramural costs, but the City shall bear any other costs of defending the United
18 States and DTSC against any such claim or cause of action.

19 c. The United States or DTSC, as applicable, shall give the City
20 prompt notice of any claim for which the United States or DTSC plans to seek
21 indemnification pursuant to Paragraph 74, and shall consult with the City prior to settling
22 such claim. The United States and DTSC also shall notify each other promptly of such
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1 claims. DTSC shall give the City the opportunity to assist in the defense of any such claim
2 at the City's expense. At the request of the United States or DTSC, the City at its own
3 expense shall undertake the defense and/or shall cooperate with the United States in the
4 defense of any such claim.
5

6 75. The City waives all claims against the United States and DTSC for
7 damages or reimbursement or for set-off of any payments made or to be made to the
8 United States or DTSC, arising from or on account of any contract, agreement, or
9 arrangement between the City, the United States or DTSC and any person for performance
10 of Work on or relating to the Site, including, but not limited to, claims on account of
11 construction delays. In addition, the City shall indemnify and hold harmless the United
12 States and DTSC with respect to any and all claims for damages or reimbursement arising
13 from or on account of any contract, agreement, or arrangement between the City and any
14 person for performance of Work on or relating to the Site, including, but not limited to,
15 claims on account of construction delays.
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17 76. Subject to its obligations under this Consent Decree, including but not
18 limited to under Paragraph 62, the City reserves all rights under the Cooperative
19 Agreement with the United States and under agreements with DTSC related to this Site for
20 reimbursement, indemnity, or other rights for work the City has undertaken pursuant to the
21 Cooperative Agreement or agreements with DTSC (1) prior to receipt of funds in the
22 O&M Escrow to cover current O&M obligations of the City under this Consent Decree,
23 excluding costs that are the sole responsibility of the City under this Consent Decree, and
24 (2) prior to receipt of funds in the Construction Escrow to cover construction obligations
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1 of the City under this Consent Decree.

2 77. No later than 15 (fifteen) days before commencing any on-site Work, the
3 City shall secure, and shall maintain until the first anniversary of EPA's final Certification
4 of Completion of the Work pursuant to Subparagraph 57.d of Section XIV (Certification
5 or Notice of Completion) comprehensive general liability insurance with limits of \$ 20
6 million (twenty million dollars), combined single limit, naming the United States and
7 DTSC as additional insureds. In addition, for the duration of this Consent Decree, the City
8 shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable
9 laws and regulations regarding the provision of worker's compensation insurance for all
10 persons performing the Work on behalf of the City in furtherance of this Consent Decree.
11 Prior to commencement of the Work under this Consent Decree, the City shall provide to
12 EPA and the DTSC certificates of such insurance and a copy of each insurance policy.
13 The City shall resubmit such certificates and copies of policies each year on the
14 anniversary of the Effective Date. If the City demonstrates by evidence satisfactory to
15 EPA that any contractor or subcontractor maintains insurance equivalent to that described
16 above, or insurance covering the same risks but in a lesser amount, then, with respect to
17 that contractor or subcontractor, the City need provide only that portion of the insurance
18 described above which is not maintained by the contractor or subcontractor. As each
19 phase of the Work is completed and EPA issues a Certification or Notice of Completion
20 for that phase of the Work under Section XIV (Certification or Notice of Completion), the
21 City may request to reduce the amount of insurance the City is required to maintain and
22 may reduce that amount with EPA approval.
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XVIII. FORCE MAJEURE

78. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the City, of any entity controlled by the City, or any of its contractors, that delays or prevents the performance of any obligation under this Consent Decree despite the City's best efforts to fulfill the obligation. The requirement that the City exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible.

"Force Majeure" does not include financial inability to complete the Work, a failure to attain the Performance Standards, or failure of the City to implement the groundwater management program or the permit plan described in Paragraphs 27-30.

79. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the City shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 9, and DTSC's Project Coordinator, within 2 (two) Working Days of when the City first knew that the event might cause a delay. Within 2 (two) Working Days thereafter, the City shall provide in writing to EPA and DTSC an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or

1 mitigate the delay or the effect of the delay; the City's rationale for attributing such delay
2 to a force majeure event if the City intends to assert such a claim; and a statement as to
3 whether, in the opinion of the City, such event may cause or contribute to an
4 endangerment to public health, welfare or the environment. The City shall include with
5 any notice all available documentation supporting its claim that the delay was attributable
6 to a force majeure. Failure to comply with the above requirements shall preclude the City
7 from asserting any claim of force majeure for that event for the period of time of such
8 failure to comply, and for any additional delay caused by such failure. The City shall be
9 deemed to know of any circumstance of which the City, any entity controlled by the City,
10 or the City's contractors knew or should have known.
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13 80. If EPA agrees that the delay or anticipated delay is attributable to a force
14 majeure event, the time for performance of the obligations under this Consent Decree that
15 are affected by the force majeure event will be extended by EPA for such time as is
16 necessary to complete those obligations. An extension of the time for performance of the
17 obligations affected by the force majeure event shall not, of itself, extend the time for
18 performance of any other obligation. If EPA does not agree that the delay or anticipated
19 delay has been or will be caused by a force majeure event, EPA will notify the City and
20 DTSC in writing of its decision. If EPA agrees that the delay is attributable to a force
21 majeure event, EPA will notify the City and DTSC in writing of the length of the
22 extension, if any, for performance of the obligations affected by the force majeure event.
23

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25 81. If the City elects to invoke the dispute resolution procedures set forth in
26 Section XIX (Dispute Resolution), the City shall do so no later than 15 (fifteen) days after
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1 receipt of EPA's notice. In any such proceeding, the City shall have the burden of
2 demonstrating by a preponderance of the evidence that the delay or anticipated delay has
3 been or will be caused by a force majeure event, that the duration of the delay or the
4 extension sought was or will be warranted under the circumstances, that best efforts were
5 exercised to avoid and mitigate the effects of the delay, and that the City complied with the
6 requirements of Paragraph 79, above. If the City carries this burden, the delay at issue
7 shall be deemed not to be a violation by the City of the affected obligation of this Consent
8 Decree identified to EPA and the Court.
9

10 XIX. DISPUTE RESOLUTION

11 82. Unless otherwise expressly provided for in this Consent Decree, the dispute
12 resolution procedures of this Section shall be the City's exclusive mechanism to resolve
13 disputes arising under or with respect to this Consent Decree. However, the procedures set
14 forth in this Section shall not apply to actions by the United States or DTSC to enforce
15 obligations of the City that have not been disputed in accordance with this Section. Nor
16 shall the procedures set forth in this Section apply to any dispute between the United
17 States and DTSC.
18

19 83. Any dispute between the City and EPA which arises under or with respect
20 to this Consent Decree shall in the first instance be the subject of informal negotiations
21 between the City and EPA. The period for informal negotiations shall not exceed 20
22 (twenty) days from the time the dispute arises, unless it is modified by written agreement
23 of the Parties to the dispute. The dispute shall be considered to have arisen when one
24 Party sends the other Party a written Notice of Dispute.
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1 a. In the event that the City and EPA cannot resolve a dispute by
2 informal negotiations under this Paragraph, then the position advanced by EPA shall be
3 considered binding unless, within 30 (thirty) days after the conclusion of the informal
4 negotiation period, the City invokes the formal dispute resolution procedures of this
5 Section by serving on EPA a written Statement of Position on the matter in dispute,
6 including, but not limited to, any factual data, analysis or opinion supporting that position
7 and any supporting documentation relied upon by the City. The Statement of Position
8 shall specify the City's position as to whether formal dispute resolution should proceed
9 under Paragraph 84 or Paragraph 85.
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11 b. Within 15 (fifteen) working days after receipt of the City's
12 Statement of Position, EPA will serve on the City its Statement of Position, including, but
13 not limited to, any factual data, analysis, or opinion supporting that position and all
14 supporting documentation relied upon by EPA. EPA's Statement of Position shall include
15 a statement as to whether formal dispute resolution should proceed under Paragraph 84 or
16 85. Within 5 (five) Working Days after receipt of EPA's Statement of Position, the City
17 may submit a Reply.
18

19 c. If there is disagreement between EPA and the City as to whether
20 dispute resolution should proceed under Paragraph 84 or 85, EPA and the City shall follow
21 the procedures set forth in the paragraph determined by EPA to be applicable. However, if
22 the City ultimately appeals to the Court to resolve the dispute, the Court shall determine
23 which Paragraph is applicable in accordance with the standards of applicability set forth in
24 Paragraphs 84 and 85.
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1 84. Formal dispute resolution for disputes between the City and EPA pertaining
2 to the selection or adequacy of any response action and all other disputes that are accorded
3 review on the administrative record under applicable principles of administrative law shall
4 be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this
5 Paragraph, the adequacy of any response action includes, without limitation: (1) the
6 adequacy or appropriateness of plans, procedures to implement plans, or any other items
7 requiring approval by EPA or DTSC under this Consent Decree; and (2) the adequacy of
8 the performance of response actions taken pursuant to this Consent Decree. Nothing in
9 this Consent Decree shall be construed to allow any dispute by the City regarding the
10 validity of the RODs' provisions.
11

12 a. An administrative record of the dispute shall be maintained by EPA,
13 and shall contain all Statements of Position, including supporting documentation,
14 submitted pursuant to this Section. Where appropriate, EPA may allow submission of
15 supplemental Statements of Position.
16

17 b. The Director of the Superfund Division, EPA Region 9, will issue a
18 final administrative decision resolving the dispute based on the administrative record
19 described in Paragraph 84.a. This decision shall be binding upon the affected Parties,
20 subject only to the right to seek judicial review pursuant to Paragraph 84.c and 85.a.
21

22 c. Any administrative decision made by EPA pursuant to
23 Paragraph 84.b shall be reviewable by this Court, provided that a motion for judicial
24 review of the decision is filed by the City with the Court and served on EPA within 15
25 (fifteen) days of receipt of EPA's decision. The motion shall include a description of the
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1 matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the
2 schedule, if any, within which the dispute must be resolved to ensure orderly
3 implementation of this Consent Decree. The United States may file a response to the
4 City's motion within 30 (thirty) days of such motion.

5
6 d. In proceedings on any dispute governed by this Paragraph, the City
7 shall have the burden of demonstrating that the decision of the Superfund Division
8 Director is arbitrary and capricious or otherwise not in accordance with law. Judicial
9 review of EPA's decision shall be on the administrative record compiled pursuant to
10 Paragraph 84.a.

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12 85. Formal dispute resolution for disputes between the City and EPA that
13 neither pertain to the selection or adequacy of any response action, nor are otherwise
14 accorded review on the administrative record under applicable principles of administrative
15 law, shall be governed by this Paragraph.

16 a. Following receipt of the City's Statement of Position submitted
17 pursuant to Paragraph 83, the Director of the Superfund Division, EPA Region 9, will
18 issue a final decision resolving the dispute. The Superfund Division Director's decision
19 shall be binding on the City unless, within 15 (fifteen) days of receipt of the decision, the
20 City files with the Court and serves on EPA a motion for judicial review of the decision
21 setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief
22 requested, and the schedule, if any, within which the dispute must be resolved to ensure
23 orderly implementation of the Consent Decree. The United States may file a response to
24 the City's motion within 30 (thirty) days of such motion. DTSC shall have the opportunity
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1 to provide statements of position and to respond to any City motion in any dispute between
2 the City and EPA.

3 b. Notwithstanding Paragraph P of Section I (Background) of this
4 Consent Decree, judicial review of any dispute governed by this Paragraph shall be
5 governed by applicable principles of law.
6

7 86. Disputes that arise under this Consent Decree between the City and DTSC
8 relating to DTSC's decisions or the Work performed pursuant to DTSC acting as the Lead
9 Oversight Agency shall be resolved in accordance with this Paragraph. The City and
10 DTSC agree to use their best efforts to resolve all disputes informally. The City and
11 DTSC agree that the procedures contained in this Paragraph are the required
12 administrative procedures for resolving disputes arising under this Consent Decree. If the
13 City fails to follow the procedures contained in this Paragraph, it shall have waived its
14 right to further contest the disputed issue. The City reserves its legal rights to contest or
15 defend against any final decision rendered by DTSC under this Paragraph. Disputes
16 regarding DTSC billings or payment of Oversight Costs shall follow the procedures set
17 forth in Paragraph 66 and Paragraph 86.c.
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20 a. The City shall first seek resolution with DTSC's assigned project
21 manager and unit chief by providing a written statement of the dispute. If the issue is not
22 resolved after review by the unit chief, the City shall seek resolution with the DTSC
23 branch chief by presenting in a letter the issues in dispute, the legal or other basis for the
24 City's position, and the remedy sought. The branch chief shall issue a written decision
25 with an explanation for the decision within thirty (30) business days after receipt of the
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1 letter from the City.

2 b. If the City disagrees with the branch chief's decision, the City may
3 appeal to the Statewide Cleanup Operations Division Chief. To appeal to the division
4 chief, the City shall prepare a letter stating the reasons why the branch chief's decision is
5 not acceptable. Attached to the letter shall be (i) the City's original statement of dispute,
6 (ii) supporting documents, and (iii) copies of any responses prepared by the project
7 manager, unit chief, and branch chief. This letter and attachments shall be sent to the
8 division chief within ten (10) business days from the date of the City's receipt of the
9 branch chief's response. The division chief or designee shall review the City's letter and
10 supporting documents, consider the issues raised and render a written decision to the City
11 within thirty (30) business days of receipt of the City's letter. The decision of the division
12 chief, or designee, shall constitute DTSC's administrative decision on the issues in
13 dispute.
14

15 c. If the City contests payment of any Oversight Costs to DTSC, it
16 shall comply with the procedures set forth in Paragraph 66. Prior to requesting formal
17 dispute resolution, the City shall notify DTSC's assigned project manager and attempt to
18 informally resolve the dispute with DTSC's project manager and branch chief. The
19 written request for dispute resolution shall describe all issues in dispute and shall set forth
20 the reasons for the dispute, both factual and legal. All notices and submissions required
21 pursuant to Paragraph 66 and the written request for dispute resolution shall be sent to:
22

23 Special Assistant for Cost Recovery and Reimbursement Policy
24 Department of Toxic Substances Control
25 P.O. Box 806
26 Sacramento, CA 95812-0806
27
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1 Copies of those notices and submissions and of the written request for dispute resolution
2 shall also be sent to those persons designated by DTSC to receive notices and submissions
3 in Section XXVI of this Consent Decree. A decision on the billing dispute will be
4 rendered by the Special Assistant for Cost Recovery and Reimbursement Policy or other
5 DTSC designee.
6

7 d. The decision by the division chief under subparagraph b. or the
8 Special Assistant for Cost Recovery and Reimbursement Policy under subparagraph c.
9 shall be binding on the City unless, within 15 (fifteen) days of the receipt of the decision,
10 the City files with the court and serves on DTSC a motion for judicial review of the
11 decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the
12 relief requested, and the schedule, if any, within which the dispute must be resolved to
13 ensure orderly implementation of the Consent Decree. DTSC may file a response within
14 30 (thirty) days of such motion. The United States shall have the opportunity to provide
15 statements of position and to respond to any City motion.
16

17 87. The invocation of formal dispute resolution procedures under this Section
18 shall not extend, postpone or affect in any way any obligation of the City under this
19 Consent Decree, not directly in dispute, unless either EPA or DTSC, as applicable, or the
20 Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall
21 continue to accrue but payment shall be stayed pending resolution of the dispute as
22 provided in Paragraph 98. Notwithstanding the stay of payment, stipulated penalties shall
23 accrue from the first day of noncompliance with any applicable provision of this Consent
24 Decree. In the event that the City does not prevail on the disputed issue, stipulated
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1 penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

2 XX. STIPULATED PENALTIES

3 88. The City shall be liable for stipulated penalties in the amounts set forth in
4 this Section to the United States and DTSC for the City's failure to comply with the
5 requirements of this Consent Decree as specified below, unless excused under Section
6 XVIII (Force Majeure). "Compliance" by the City shall include completion of the
7 activities under this Consent Decree or any work plan or other plan approved under this
8 Consent Decree or, after the date of entry of this Consent Decree, construction of the
9 Muscoy extraction system begun under the Cooperative Agreement, identified below, in
10 accordance with all applicable requirements of law, this Consent Decree, the SOW, and
11 any plans or other documents approved pursuant to this Consent Decree and within the
12 specified time schedules established by and approved under this Consent Decree.
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15 89. Stipulated Penalty Amounts - Work.

16 a. The following stipulated penalties shall accrue per violation per day
17 for any noncompliance identified in Subparagraph 89.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1500	1st through 14th day
\$ 2500	15th through 30th day
\$ 10,000	31st day and beyond

23 b. Compliance Milestones. The Compliance Milestones include both
24 the timely and adequate submittal (as defined in Section XI, Approval of Plans and Other
25 Submissions) of, and compliance with the following documents and requirements:
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- (1) O&M Plans
- (2) Health & Safety Plan
- (3) Operational Sampling and Analysis Plan
- (4) Contingency Plan
- (5) Time Line and Schedule
- (6) Pre-Certification Inspection and Report
- (7) O&M Completion Report
- (8) Statement of Position on De-commissioning

90. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports, including but not limited to Progress Reports and Quarterly Quality Assurance Reports, or other written documents pursuant to this Consent Decree, other than the Compliance Milestones:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1000	1st through 14th day
\$ 2500	15th through 30th day
\$ 5000	31st day and beyond

91. Stipulated Penalty Amounts – Access, Institutional Controls. For violation of any obligation of Section IX (Access/Institutional Controls) or Paragraphs 27-30 of this Consent Decree, stipulated penalties shall accrue per violation per day in the amount of:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2500	1st through 14th day

1	\$ 5000	15th through 30th day
2	\$ 10,000	31st day and beyond

3 92. Stipulated Penalty Amounts – Other Obligations of the Consent Decree. For
4 violation of any other obligation of this Consent Decree, stipulated penalties shall accrue
5 per violation per day in the amount of:
6

7	<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
8	\$ 2500	1st through 14th day
9	\$ 5000	15th through 30th day.
10	\$ 10,000	31st day and beyond

11 93. In the event that EPA assumes performance of a portion or all of the Work
12 being implemented by the City, pursuant to Paragraph 109 of Section XXI (Covenants Not
13 to Sue by Plaintiffs), the City shall be liable to EPA for a stipulated penalty in the amount
14 of: \$ 6,000,000 (six million dollars) or 100% of the response costs incurred by EPA for
15 such work, whichever is less. Such amount shall not be payable from the O&M Escrow,
16 the Construction Escrow or reimbursed to the City from any special account. The City
17 also shall reimburse EPA for all response costs incurred by EPA to perform a portion or all
18 of the Work being implemented by the City. Payments to EPA shall be made in
19 accordance with the procedures in Paragraph 62.e.
20

21 94. All penalties shall begin to accrue on the day after the complete
22 performance is due or the day a violation occurs and shall continue to accrue through the
23 final day of the correction of the noncompliance or completion of the activity. However,
24 stipulated penalties shall not accrue: (1) with respect to a deficient submission under
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1 Section XI (Approval of Plans and Other Submissions), during the period, if any,
2 beginning on the 31st (thirty-first) day after EPA's or DTSC's, as applicable, receipt of
3 such submission until the date that EPA or DTSC, as applicable, notifies the City of any
4 deficiency; (2) with respect to any proposed or actual action or change in work
5 requirements or protocols that EPA determines constitutes a fundamental change to the
6 requirements of this Consent Decree or the SOW, until EPA provides notice of such
7 determination or disapproval; provided, however, that EPA is timely notified of the action
8 or change in work requirements and protocols, including whether such action or change
9 complies with the requirements of this Consent Decree or the SOW; (3) with respect to a
10 decision by the Director of the Superfund Division, EPA Region 9, or a decision by the
11 Statewide Cleanup Operations Division Chief for DTSC under Paragraph 85.a or 86.b. of
12 Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st (thirty-
13 first) day after the date that the City's reply to EPA's or DTSC's, as applicable, Statement
14 of Position is received until the date that the Director of the Superfund Division, EPA
15 Region 9, or the Statewide Cleanup Operations Division Chief for DTSC, as applicable,
16 issues a final decision regarding such dispute; or (4) with respect to judicial review by this
17 Court of any dispute under Section XIX (Dispute Resolution), during the period, if any,
18 beginning on the 31st (thirty-first) day after the Court's receipt of the final submission
19 regarding the dispute until the date that the Court issues a final decision regarding such
20 dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for
21 separate violations of this Consent Decree.
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26 95. Following the Lead Oversight Agency's determination that the City has
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1 failed to comply with a requirement of this Consent Decree, and after a reasonable
2 opportunity for review and comment by the Support Oversight Agency, the Lead
3 Oversight Agency may give the City written notification of the same and describe the
4 noncompliance. The Lead Oversight Agency may send the City a written demand for the
5 payment of the penalties. However, penalties shall accrue as provided in the preceding
6 Paragraph regardless of whether the Lead Oversight Agency has notified the City of a
7 violation.
8

9 96. All penalties accruing under this Section shall be due and payable to the
10 Lead Oversight Agency and the Support Oversight Agency, on a 50/50 basis, within 30
11 (thirty) days of the City's receipt from the Lead Oversight Agency of a demand for
12 payment of the penalties, unless the City invokes the Dispute Resolution procedures under
13 Section XIX (Dispute Resolution). All payments to the United States under this Section
14 shall be paid by certified or cashier's check(s) made payable either to "EPA Hazardous
15 Substances Superfund," and shall be mailed to
16

17 U.S. Environmental Protection Agency
18 Region IX, Attn: Superfund Accounting
19 P.O. Box 371099M
20 Pittsburgh, PA 15251
21 Attention: David Wood

22 The transmittal shall indicate that the payment is for stipulated penalties, and shall
23 reference EPA Region 9, Site/Spill ID # 09J5, DOJ Case Number 90-11-3-06902/1 and the
24 name and address of the City. Copies of check(s) paid pursuant to this Section, and any
25 accompanying transmittal letter(s), shall be sent to the United States as provided in Section
26 XXVI (Notices and Submissions).
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1 All payments to DTSC pursuant to this Paragraph shall be made in accordance
2 with Paragraph 65 of this Consent Decree.

3 97. The payment of penalties shall not alter in any way the City's obligation to
4 complete the performance of the Work required under this Consent Decree.

5 98. Penalties shall continue to accrue as provided in Paragraph 94 during any
6 dispute resolution period, but need not be paid until the following:

7 a. If the dispute is resolved by agreement or by a decision of EPA or
8 DTSC, as applicable, that is not appealed to this Court, accrued penalties determined to be
9 owing shall be paid to EPA and DTSC within 15 (fifteen) days of the agreement or the
10 receipt of EPA's or DTSC's decision or order;

11 b. If the dispute is appealed to this Court and the United States and/or
12 DTSC prevails in whole or in part, the City shall pay all accrued penalties determined by
13 the Court to be owed to EPA and DTSC within 60 (sixty) days of receipt of the Court's
14 decision or order, except as provided in Subparagraph c below;

15 c. If the Court's decision is appealed by the City, the City shall pay all
16 accrued penalties determined by the Court to be owing to the United States and DTSC into
17 an interest-bearing escrow account within 60 (sixty) days of receipt of the Court's decision
18 or order. Penalties shall be paid into this account as they continue to accrue, at least every
19 60 (sixty) days. Within 15 (fifteen) days of receipt of the final appellate court decision, the
20 escrow agent shall pay the balance of the account to EPA and DTSC, or to the City to the
21 extent that they prevail.

22 99. If the City fails to pay stipulated penalties when due, EPA and/or DTSC
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1 may institute proceedings to collect the penalties, as well as Interest. The City shall pay
2 Interest on the unpaid balance, which shall begin to accrue on the date of demand made
3 pursuant to Paragraph 95.

4 100. Nothing in this Consent Decree shall be construed as prohibiting, altering,
5 or in any way limiting the ability of the United States or DTSC to seek any other remedies
6 or sanctions available by virtue of the City's violation of this Decree or of the statutes and
7 regulations upon which it is based, including, but not limited to, penalties pursuant to
8 Section 122(l) of CERCLA, 42 U.S.C. § 9622(l). Provided, however, that the United
9 States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any
10 violation for which a stipulated penalty is collected hereunder, except in the case of a
11 willful violation of the Consent Decree.
12

13
14 101. Notwithstanding any other provision of this Section, the United States or
15 DTSC may, in their unreviewable discretion, waive any portion of stipulated penalties that
16 have accrued to them pursuant to this Consent Decree.
17

18 XXI. COVENANTS BY THE UNITED STATES AND DTSC

19 102. a. In consideration of the actions that will be performed by the City and
20 the payments that will be made by the City under the terms of the Consent Decree, and
21 except as specifically provided in Paragraph 106 of this Section, the United States
22 covenants not to sue or to take administrative action against the City pursuant to Sections
23 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), with respect to the Work, and the
24 work performed under the Cooperative Agreement, subject to the United States' reservation
25 of rights with respect to the Cooperative Agreement, and for recovery of Past U.S.
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1 Response Costs and Future U.S. Response Costs. The United States also releases and
2 covenants not to sue the City and DTSC for the costs of the litigation called *City of San*
3 *Bernardino Municipal Water Department vs. United States of America, Department of the*
4 *Army, Civ. No. CV96-8867 MRP, and State of California v. United States of America,*
5 *Department of the Army, Civ. No. 96-5205-MRP* in this Court, including but not limited to
6 attorneys' fees, expert witness fees and litigation support costs, incurred through the date
7 upon which this Consent Decree is no longer subject to appeal, except to the extent such
8 costs are expressly payable pursuant to this Consent Decree. These covenants not to sue as
9 to the City and DTSC shall take effect upon entry of this Consent Decree. These covenants
10 not to sue are conditioned with respect to the City upon the satisfactory performance by the
11 City of its obligations under this Consent Decree. These covenants not to sue extend only
12 to the City and DTSC, as appropriate, and do not extend to any other person.

15 b. In consideration of the actions that have been performed and the
16 payments that will be made by the Settling Federal Agencies under the terms of this
17 Consent Decree, and except as specifically provided in Paragraph 106 of this Section, EPA
18 covenants not to take administrative action against the Settling Federal Agencies pursuant
19 to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), with respect to the
20 Work, and the work performed under the Cooperative Agreement, and for recovery of Past
21 U.S. and Future U.S. Response Costs. EPA's covenant shall take effect upon the payments
22 required by Paragraph 60 of Section XVI (Payments for Response Costs). EPA's covenant
23 is conditioned upon the satisfactory performance by the Settling Federal Agencies of their
24 obligations under this Consent Decree. EPA's covenant extends only to the Settling
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1 Federal Agencies and does not extend to any other person.

2 c. United States' Pre-certification Reservations -- Unknown Conditions or
3 Information. Notwithstanding any other provision of this Consent Decree, the United
4 States reserves, and this Consent Decree is without prejudice to, the right to institute
5 proceedings in this action or in a new action, or to issue an administrative order seeking to
6 compel
7 compel

8 (1) the performance of further response actions relating to the
9 Site, or

10 (2) the reimbursement of the United States for additional costs of
11 response

12 if, prior to certification that the Muscoy OU Interim Remedial Action is operational and
13 functional pursuant to 40 C.F.R. § 300.435(f)(2):

14 (1) information, previously unknown to EPA, is received, in
15 whole or in part, and

16 (2) EPA determines that these previously unknown conditions or
17 information together with any other relevant information indicates that the Interim
18 Remedial Actions are not protective of human health or the environment.

19 d. United States' Pre-certification Reservations -- Non-Routine O&M.
20 Notwithstanding any other provision of this Consent Decree, the United States reserves,
21 and this Consent Decree is without prejudice to, the right to institute proceedings in this
22 action or in a new action, or to issue an administrative order seeking to compel

23 (1) the performance of further response actions relating to the
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1 Site, or

2 (2) the reimbursement of the United States for additional costs of
3 response

4 if, prior to certification that the Muscoy OU Interim Remedial Action is operational and
5 functional pursuant to 40 C.F.R. § 300.435(f)(2), EPA determines that the Non-Routine
6 O&M that can be required under the SOW is not protective of human health or the
7 environment.
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9 e. United States' Post-certification Reservations -- Unknown Conditions
10 or Information. Notwithstanding any other provision of this Consent Decree, the United
11 States reserves, and this Consent Decree is without prejudice to, the right to institute
12 proceedings in this action or in a new action, or to issue an administrative order seeking to
13 compel
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15 (1) the performance of further response actions relating to the
16 Site, or

17 (2) the reimbursement of the United States for additional costs of
18 response
19

20 if, subsequent to certification that the Muscoy OU Interim Remedial Action is operational
21 and functional pursuant to 40 C.F.R. § 300.435(f)(2):

22 (1) conditions at the Site, previously unknown to EPA, are
23 discovered, or information, previously unknown to EPA, is received, in whole or in part,
24 and
25

26 (2) EPA determines that these previously unknown conditions or
27
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1 this information together with other relevant information indicate that the Interim Remedial
2 Actions, or any of them, are not protective of human health or the environment.

3 f. United States' Post-certification Reservations -- Non-Routine O&M.

4 Notwithstanding any other provision of this Consent Decree, the United States reserves,
5 and this Consent Decree is without prejudice to, the right to institute proceedings in this
6 action or in a new action, or to issue an administrative order seeking to compel
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8 (1) the performance of further response actions relating to the
9 Site, or

10 (2) the reimbursement of the United States for additional costs of
11 response

12 if, subsequent to certification that the Muscoy OU Interim Remedial Action is operational
13 and functional pursuant to 40 C.F.R. § 300.435(f)(2), EPA determines that the Non-Routine
14 O&M that can be required under the SOW is not protective of human health or the
15 environment.
16

17 g. For purposes of Paragraph 102(c), the information and the conditions
18 known to EPA shall include only (i) that information and those conditions known to EPA
19 as of the dates the RODs were signed and set forth in the Records of Decisions for the
20 Newmark and Muscoy OUs and the administrative records supporting the Records of
21 Decision; and (ii) information required to be provided by the City under the Cooperative
22 Agreements up to the date that EPA certifies that the Muscoy Operable Unit is operational
23 and functional. For purposes of Paragraph 102(e), the information and the conditions
24 known to EPA shall include only (i) the information and conditions listed for Paragraph
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1 102(c); and (ii) that information and those conditions known to EPA as of the date of
2 certification that the Muscoy OU Interim Remedial Action is operational and functional
3 pursuant to 40 C.F.R. § 300.435(f)(2) and set forth in the Records of Decision, the
4 administrative records supporting the Records of Decision, the post-ROD administrative
5 records, or in any information received by EPA pursuant to the requirements of this
6 Consent Decree prior to such certification.
7

8 103. In consideration of the City's actions and its obligations under this Consent
9 Decree, and except as specifically provided in Paragraph 108 (General Reservations of
10 Rights by DTSC), DTSC covenants not to sue or take administrative action against the City
11 pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, Section 7003 of the Resource
12 Conservation and Recovery Act, 42 U.S.C. § 6973, or any State counterparts of these
13 statutes, or to seek any natural resource damages relating to the Newmark Groundwater
14 Contamination Superfund Site. These covenants will take effect upon entry of this Consent
15 Decree. These covenants not to sue are conditioned upon satisfactory performance of the
16 City's obligations under this Consent Decree. These covenants not to sue extend only to
17 the City, and not to any other person.
18
19

20 104. In consideration of the actions that have been performed and the payments
21 that will be made by the Settling Federal Agencies and the City under the terms of the
22 Consent Decree, and except as specifically provided in Paragraph 108 of this Section,
23 DTSC covenants not to sue or to take administrative action against the City and the United
24 States pursuant to Sections 107(a) and 113 of CERCLA, 42 U.S.C. §§ 9607(a), 9613,
25 California Health & Safety Code § 25360 or any other State law counterparts of these
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1 statutes, with respect to the Newmark and Muscoy OUs, the Work, the work performed
2 under the Cooperative Agreement, recovery of DTSC Past Response Costs, DTSC Future
3 Response Costs, DTSC Oversight Costs, any past State order related to the groundwater
4 contamination at the Newmark Groundwater Contamination Superfund Site, and natural
5 resource damages, including the reasonable costs of assessing any injury, destruction or loss
6 of natural resources. DTSC also releases and covenants not to sue the City and the United
7 States for the costs of the litigation called *State of California v. United States of America*,
8 *Department of the Army*, Civ. No. 96-5205-MRP in this Court, including but not limited to
9 attorneys' fees, expert witness fees and litigation support costs. These covenants not to sue
10 shall take effect upon the Effective Date of this Consent Decree. These covenants not to
11 sue are conditioned with respect to the applicable Parties upon the satisfactory performance
12 by the respective Parties of their obligations under this Consent Decree. These covenants
13 not to sue extend only to the United States and the City and do not extend to any other
14 person. Upon approval by the Court of this Consent Decree, the natural resource damages
15 claims pled in DTSC's complaint shall be dismissed with prejudice.

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19 105. Covenant by the Settling Federal Agencies. The Settling Federal Agencies
20 hereby agree not to assert any direct or indirect claim with respect to the Site for
21 reimbursement from the Hazardous Substance Superfund (established pursuant to the
22 Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111,
23 112, 113, or any other provision of law, for Past U.S. Response Costs and Future U.S.
24 Response Costs as defined herein, with respect to the Work, and the work performed under
25 the Cooperative Agreement, or this Consent Decree, or any claims for costs of litigation in
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1 the action called *City of San Bernardino Municipal Water Department v. United States,*
2 *Department of the Army*, Civ. No. CV96-8867 MRP in this Court, and the action called
3 *State of California v. United States of America, Department of the Army*, Civ. No. 96-5205-
4 MRP in this Court, including but not limited to attorneys' fees, expert witness fees and
5 litigation support costs through the date upon which this Consent Decree is no longer
6 subject to appeal.
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8 106. General Reservations of Rights by the United States. The United States
9 reserves, and this Consent Decree is without prejudice to, all rights against the City (and
10 with respect to EPA, all rights against the Settling Federal Agencies) with respect to all
11 matters not expressly included within the United States' covenant not to sue.
12

13 Notwithstanding any other provision of this Consent Decree, the United States reserves all
14 rights against the City (and with respect to EPA, all rights against the Settling Federal
15 Agencies) with respect to:

16 a. claims based on a failure to meet a requirement of this Consent
17 Decree;
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19 b. liability based upon the Party's transportation, treatment, storage, or
20 disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste
21 Material at or in connection with the Site, other than as provided in the RODs, the ESD, the
22 Work, the SOW, or otherwise ordered by EPA, after signature of this Consent Decree by
23 such Party;
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25 c. liability for damages for injury to, destruction of, or loss of natural
26 resources under federal trusteeship at the Newmark Groundwater Contamination Superfund
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1 Site, including the cost of assessing such injury, destruction or loss;

2 d. criminal liability;

3 e. liability for violations of federal or state law which occur during or
4 after implementation of the Interim Remedial Actions;

5 f. liability, prior to the final Certification or Notice of Completion of
6 the Work, for additional response actions that EPA determines are necessary to achieve
7 Performance Standards, but that cannot be required pursuant to Paragraph 17 (Modification
8 of the SOW or Related Work Plans);

9 g. liability for additional work at the Newmark or Muscoy OU that is
10 not required pursuant to this Consent Decree, for additional operable units or the final
11 response action at the Newmark Groundwater Contamination Superfund Site;

12 h. liability for costs incurred or to be incurred by the Agency for Toxic
13 Substances and Disease Registry related to the Site that are not included in United States
14 Past Costs;

15 i. liability for costs that the United States will incur related to the Site
16 but that are not within the definition of Past U.S. Response Costs or Future U.S. Response
17 Costs;

18 j. liability of the City to reimburse EPA for disbursements under the
19 Cooperative Agreement for Work covered by this Consent Decree in the event the same
20 Work is also reimbursable under this Consent Decree;

21 k. liability of the City for United States Future Response Costs, if any,
22 incurred after the earliest of the time periods described in Paragraph 14.a applicable to the
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1 costs in question, provided, however, that such costs shall first be offset by the amount of
2 any disbursement under Paragraph 60.a.2 or 60.a.5; and

3 1. liability arising from the past, present, or future arrangement for
4 disposal, release, or threat of release of Waste materials outside of the Site.

5 107. The Settling Federal Agencies reserve, and this Consent Decree is without
6 prejudice to

7 a. claims against DTSC for money damages for injury or loss of property
8 or personal injury or death caused by the negligent or wrongful act or omission of any
9 employee of DTSC while acting within the scope of his office or employment under
10 circumstances where DTSC, if a private person, would be liable to the claimant in
11 accordance with the law of the place where the act or omission occurred. However, any
12 such claim shall not include a claim for any damages caused, in whole or in part, by the act
13 or omission of any person, including any contractor, who is not a state employee as
14 provided in comparable state law to 28 U.S.C. § 2671, nor shall any such claim include a
15 claim based on EPA's or the DTSC's selection of response actions, or the oversight or
16 approval of any Party's plans or activities; and

17 b. contribution claims against DTSC in the event any claim is asserted by
18 DTSC against the City or the Settling Federal Agencies, but only to the same extent and for
19 the same matters, transactions or occurrences as are raised in the claim of DTSC against the
20 City or the Settling Federal Agencies.

21 108. General Reservations of Rights by DTSC. The covenants not to sue set
22 forth above do not pertain to any matters other than those expressly specified in Paragraph
23

1 104, and except as specifically provided in this Paragraph. DTSC reserves, and this
2 Consent Decree is without prejudice to DTSC's rights to pursue, other claims against the
3 City and the Settling Federal Agencies, with respect to all other matters, including but not
4 limited to, the following:

5 a. claims that either the City or the Settling Federal Agencies have
6 failed to meet a requirement of this Consent Decree;

7 b. liability arising from the past, present, or future disposal, release, or
8 threat of release of Waste Materials outside of the Site;

9 c. liability for future disposal of Waste Material at the Site, other than
10 as provided in the RODs, the ESD, the SOW, the Work, or otherwise ordered by EPA;
11 provided however that the production, storage and distribution of treated water and the
12 transmission of untreated water for treatment shall not under any circumstances give rise to
13 DTSC claims alleging City liability;

14 d. criminal liability;

15 e. liability for violations of federal or state law which occur during or
16 after implementation of the Interim Remedial Actions;

17 f. liability by Settling Federal Agencies, prior to Certification of
18 Completion of the Work, for additional response actions that EPA determines are necessary
19 to achieve Performance Standards, but that cannot be required pursuant to Paragraph 17
20 (Modification of the SOW or Related Work Plans);

21 g. liability by Settling Federal Agencies for additional work at the
22 Newmark or Muscoy OU that is not required pursuant to this Consent Decree, for
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1 additional operable units or the final response action at the Newmark Groundwater
2 Contamination Superfund Site, or for any additional costs of response which may be
3 required if (1) EPA makes a determination pursuant to Paragraph 102.d or 102.f that the
4 Non-Routine O&M that can be required under the SOW is not protective of human health
5 or the environment, or (2) EPA makes a determination pursuant to Paragraph 102.c or 102.e
6 that previously unknown conditions or information together with any other relevant
7 information indicates that the Interim Remedial Actions are not protective of human health
8 or the environment;

10 h. liability by Settling Federal Agencies for costs that DTSC will incur
11 related to the Site but that are not within the definition of DTSC Past Response Costs,
12 DTSC Future Response Costs, Oversight Costs or natural resource damages; and

14 i. liability for contamination at or emanating from other sites including
15 but not limited to the Norton Air Force Base Superfund Site.

16 109. Work Takeover In the event that EPA determines that the City has ceased
17 implementation of any portion of the Work, is seriously or repeatedly deficient or late in its
18 performance of the Work, or is implementing the Work in a manner that may cause an
19 endangerment to human health or the environment, EPA may assume the performance of
20 all or any portions of the Work as EPA determines necessary. The City may invoke the
21 procedures set forth in Section XIX (Dispute Resolution), Paragraph 86.a, to dispute EPA's
22 determination that takeover of the Work is warranted under this Paragraph. Costs incurred
23 by EPA in performing the Work pursuant to this Paragraph shall be paid by the City as
24 Extraordinary Costs within 30 (thirty) days of a demand by EPA, according to the
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1 procedures set forth in Paragraph 62.e. Such payments may be made from the O&M
2 Escrow. Subject to EPA's unreviewable discretion, EPA may determine, with DTSC's
3 concurrence, that DTSC may take over the Work under the circumstances described in this
4 Paragraph. In that event, DTSC costs incurred in performing the Work pursuant to this
5 Paragraph shall be paid by the City to DTSC. Payments to DTSC in accordance with this
6 Paragraph shall be made within 30 (thirty) days of a demand by DTSC according to the
7 procedures in Paragraph 65, and may be made from the O&M Escrow. Such costs shall not
8 be subject to any cap for recovery of DTSC or EPA Oversight Costs.
9

10 110. Lead Oversight Takeover

11 (a) It is EPA's statutory obligation to ensure the successful completion of
12 the Interim Remedies. If EPA determines that DTSC is not able to perform the Lead
13 Oversight Agency functions in a timely and effective manner, EPA may resume the Lead
14 Oversight Agency role until DTSC is able to resume that role. EPA shall meet and confer
15 with DTSC before determining to resume the Lead Oversight Agency role; however, EPA's
16 determination shall not be subject to dispute resolution. Such takeover shall be effective
17 upon notice by EPA to DTSC and the City in accordance with Section XVII (Notices and
18 Submissions).
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21 (b) In the event that EPA takes over as Lead Oversight Agency, DTSC
22 shall not pay a stipulated penalty, but EPA shall be entitled to be paid its oversight costs by
23 the City, for the additional work entailed in EPA's takeover of the work, notwithstanding
24 whether DTSC has exhausted the funds available to be paid to it for oversight pursuant to
25 Paragraph 65 of this Consent Decree. In no event shall DTSC be responsible for
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1 reimbursing EPA for any oversight costs beyond what EPA is reimbursed by the City.

2 Payment to the United States shall be made pursuant to Paragraph 62.e.

3 (c) If EPA subsequently determines that DTSC is able to perform the Lead
4 Oversight Agency functions in a timely and effective manner, EPA may return the Lead
5 Oversight Agency functions to DTSC, which shall be effective upon notice by EPA to
6 DTSC and the City in accordance with Section XVII (Notices and Submissions).
7

8 111. Notwithstanding any other provision of this Consent Decree, the United
9 States and DTSC retain all authority and reserve all rights to take any and all response
10 actions authorized by law.

11 XXII. COVENANTS BY THE CITY OF SAN BERNARDINO

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13 112. In consideration of DTSC's actions and its obligations under this Consent
14 Decree, and except as specifically provided in Paragraph 114 (Reservations of Rights by the
15 City), the City covenants not to sue or take administrative action against DTSC pursuant to
16 Sections 107 and/or 113 of CERCLA, 42 U.S.C. §§ 9607, 9613, Section 7003 of the
17 Resource Conservation and Recovery Act, 42 U.S.C. § 6973, and any State law
18 counterparts of these statutes, or to seek any natural resource damages relating to the
19 Newmark Groundwater Contamination Superfund Site. These covenants not to sue shall
20 take effect upon entry of this Consent Decree. These covenants not to sue extend only to
21 DTSC and any successor agency and not to any other person.
22

23 113. In consideration of the actions that have been performed and the payments
24 that will be made by the United States, and subject to the reservations in Paragraph 114, the
25 City hereby covenants not to sue and agrees not to assert any claims or causes of action
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1 against the United States with respect to the Work, the work performed under the
2 Cooperative Agreement, the work performed under any past State order related to the
3 groundwater contamination at the Newmark Groundwater Contamination Superfund Site,
4 or any obligation of the City under Paragraph 14 of this Consent Decree, City Past and City
5 Future Response Costs as defined herein, any costs incurred by the City that have been or
6 are reimbursed by any disbursement pursuant to Paragraph 60.a.2 or 60.a.5, and other past
7 response actions or costs taken or incurred by the City, or this Consent Decree, no matter
8 how such claims are pled or styled, including, but not limited to:

10 a. any direct or indirect claim for reimbursement from the Hazardous
11 Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C.
12 § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, 42 U.S.C. §§
13 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law, but without prejudice to
14 the City's rights under the Cooperative Agreement and this Consent Decree to be
15 reimbursed for work it has conducted pursuant to the Cooperative Agreement for the
16 Newmark and Muscoy OUs prior to the funding of the escrows under this Consent Decree;

19 b. any claims against the United States under CERCLA Sections 107 or
20 113, 42 U.S.C. §§ 9607, 9613, or state law, related to the Site or the Site-wide Monitoring;

21 c. any claims arising out of response actions at or in connection with
22 the Site or the Site-wide Monitoring, including any claims arising under the United States
23 Constitution, the California Constitution, state law, the Tucker Act, 28 U.S.C. § 1491, the
24 Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law, arising out
25 of or relating to past or future access to, imposition of deed restriction or easements, or
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1 other restrictions on the use and enjoyment of property owned or controlled by the City;

2 d. any claims for costs, fees or expenses incurred in this action
3 (including claims arising under the Equal Access to Justice Act, as amended, 28 U.S.C. §
4 2412) or under any provision of state law, through the date upon which this Consent Decree
5 is no longer subject to appeal;

6 e. Any claims for costs, fees or expenses arising from or relating to the
7 groundwater management and permitting program described in Paragraphs 27-30;

8 f. any claims for costs of litigation in the action called *City of San*
9 *Bernardino Municipal Water Department v. United States, Department of the Army*, Civ.
10 No. CV96-8867 MRP in this Court, including but not limited to attorneys' fees, expert
11 witness fees and litigation support costs, through the date upon which this Consent Decree
12 is no longer subject to appeal; and
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14 g. any direct or indirect claim for disbursement from any special
15 account established pursuant to this Consent Decree except as expressly provided for in this
16 Consent Decree.
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18 114. Reservation of Rights by the City. The City reserves, and this Consent
19 Decree is without prejudice to
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21 a. claims against the United States, subject to the provisions of Chapter
22 171 of Title 28 of the United States Code, or DTSC, subject to comparable state law, for
23 money damages for injury or loss of property or personal injury or death caused by the
24 negligent or wrongful act or omission of any employee of the United States or DTSC while
25 acting within the scope of his office or employment under circumstances where the United
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1 States or DTSC, if a private person, would be liable to the claimant in accordance with the
2 law of the place where the act or omission occurred. However, any such claim shall not
3 include a claim for any damages caused, in whole or in part, by the act or omission of any
4 person, including any contractor, who is not a federal employee as that term is defined in 28
5 U.S.C. § 2671; or a state employee as provided in comparable state law, nor shall any such
6 claim include a claim based on EPA's or DTSC's selection of response actions, or the
7 oversight or approval of any Party's plans or activities. With respect to the United States,
8 the foregoing applies only to claims which are brought pursuant to any statute other than
9 CERCLA and for which the waiver of sovereign immunity is found in a statute other than
10 CERCLA;
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13 b. CERCLA claims and contribution claims against the Settling Federal
14 Agencies in the event any claim is asserted by the United States or DTSC against the City
15 or the Settling Federal Agencies, but only to the same extent and for the same matters,
16 transactions or occurrences as are raised in the claim of the United States or DTSC against
17 the City or the Settling Federal Agencies;
18

19 c. City claims for reimbursement under the Cooperative Agreement,
20 arising from costs incurred by the City prior to the funding of the O&M and Construction
21 Escrows as set forth in Paragraph 60.a pursuant to this Consent Decree, except for costs
22 that are the sole responsibility of the City under this Consent Decree or reimbursable to
23 EPA under Paragraph 62.c;
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25 d. Claims against the Settling Federal Agencies for liability, prior to the
26 final Certification or Notice of Completion of the Work, for additional response actions that
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1 EPA determines are necessary to achieve the Performance Standards, but that cannot be
2 required pursuant to Paragraph 17 (Modification of SOW or Related Work Plans);

3 e. Liability for additional work at the Newmark or Muscoy OU that is not
4 required pursuant to the Consent Decree, for additional operable units, or the final response
5 action at the Newmark Groundwater Contamination superfund Site;
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7 f. City claims for relief arising from contamination at or emanating from
8 other sites, including, but not limited to, the Norton Air Force Base Superfund Site;

9 g. City claims for O&M costs and City Future Response Costs, if any,
10 incurred after the earliest of the time periods described in Paragraph 14.a applicable to the
11 costs in question, provided, however, that such costs shall first be offset by the amount of
12 any disbursement under Paragraph 60.a.2 or 60.a.5; and
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14 h. City claims for liability for costs the City will incur related to the Site
15 that are not within the definition of City Past Response Costs or City Future Response
16 Costs.

17 115. Nothing in this Consent Decree shall be deemed to constitute
18 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C.
19 § 9611, or 40 C.F.R. § 300.700(d).
20

21 116. The City and the Settling Federal Agencies agree not to assert any claims
22 and to waive all claims or causes of action that they may have for all matters relating to the
23 Site, including for contribution, against any person where the person's liability to the City
24 or Settling Federal Agencies with respect to the Site is based solely on having arranged for
25 disposal or treatment, or for transport for disposal or treatment, of hazardous substances at
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1 the Site, or having accepted for transport for disposal or treatment of hazardous substances
2 at the Site, if:

3 a. any materials contributed by such person to the Site constituting
4 Municipal Solid Waste (MSW) or Municipal Sewage Sludge (MSS) did not exceed 0.2% of
5 the total volume of waste at the Site; and
6

7 b. any materials contributed by such person to the Site containing
8 hazardous substances, but not constituting MSW or MSS, did not exceed the greater of (i)
9 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or
10 200 pounds of solid materials.
11

12 c. This waiver shall not apply to any claim or cause of action against
13 any person meeting the above criteria if EPA has determined that the materials contributed
14 to the Site by such person contributed or could contribute significantly to the costs of
15 response at the Site. This waiver also shall not apply with respect to any defense, claim, or
16 cause of action that the City, DTSC or the Settling Federal Agencies may have against any
17 person if such person asserts a claim or cause of action relating to the Site against such
18 Party.
19

20 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

21 117. Nothing in this Consent Decree shall be construed to create any rights in, or
22 grant any cause of action to, any person not a Party to this Consent Decree. The preceding
23 sentence shall not be construed to waive or nullify any rights that any person not a signatory
24 to this decree may have under applicable law. Except as provided in Paragraph 116, each
25 Party expressly reserves any and all rights (including, but not limited to, any right to
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1 contribution), defenses, claims, demands, and causes of action which each Party may have
2 with respect to any matter, transaction, or occurrence relating in any way to the Site against
3 any person not a Party hereto.

4 118. The Parties agree, and by entering this Consent Decree this Court finds, that
5 the City and the Settling Federal Agencies are entitled, as of the Effective Date, to
6 protection from contribution actions or claims as provided by Section 113(f)(2) of
7 CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed in this Consent Decree. Matters
8 addressed in this Consent Decree are: (a) U.S., DTSC and City Past Response Costs; (b)
9 U.S., DTSC and City Future Response Costs; (c) the cost of implementing the Work
10 performed under this Consent Decree; (d) the work performed under the Cooperative
11 Agreement or under any past State order related to the groundwater contamination at the
12 Newmark Groundwater Contamination Superfund Site, (e) as to the City, all DTSC costs of
13 any kind incurred at any time related to the Newmark Groundwater Contamination
14 Superfund Site unless otherwise reserved; (f) DTSC natural resource damages; and (g) the
15 costs, including but not limited to attorneys' fees, expert witness fees and litigation support
16 of the actions called *City of San Bernardino Municipal Water Department v. United States*,
17 *Department of the Army*, Civ. No. CV96-8867 MRP, and *State of California v. United*
18 *States of America*, *Department of the Army*, Civ. No. 96-5205-MRP in this Court, incurred
19 through the date upon which this Consent Decree is no longer subject to appeal.

20 119. The City agrees that with respect to any suit brought by the City for matters
21 related to this Consent Decree the City will notify the United States and DTSC in writing
22 no later than 60 (sixty) days prior to the initiation of such suit or claim.

1 120. The City also agrees that with respect to any suit or claim for contribution
2 brought against it for matters related to this Consent Decree it will notify in writing the
3 United States and DTSC within 10 (ten) days of service of the complaint on the City. In
4 addition, the City shall notify the United States and DTSC within 10 (ten) days of service or
5 receipt of any Motion for Summary Judgment and within 10 (ten) days of receipt of any
6 order from a court setting a case for trial.
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8 121. In any subsequent administrative or judicial proceeding initiated by the
9 United States or DTSC for injunctive relief, recovery of response costs, or other appropriate
10 relief relating to the Newmark Groundwater Contamination Superfund Site, the City shall
11 not assert, and may not maintain, any defense or claim based upon the principles of waiver,
12 res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based
13 upon any contention that the claims raised in the subsequent proceeding were or should
14 have been brought in the instant case; provided, however, that nothing in this Paragraph
15 affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants by
16 the United States and DTSC). In any subsequent administrative or judicial proceeding
17 initiated by the City for injunctive relief, recovery of response costs, or other appropriate
18 relief relating to the Newmark Groundwater Contamination Superfund Site, the United
19 States and DTSC shall not assert, and may not maintain, any defense or claim based upon
20 the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting,
21 or other defenses based upon any contention that the claims raised in the subsequent
22 proceeding were or should have been brought in the instant case; provided, however, that
23 nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in
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1 Section XXII (Covenant by the City of San Bernardino).

2 XXIV. ACCESS TO INFORMATION

3 122. The City and the Army shall provide to EPA and DTSC, upon request,
4 copies of all non-privileged documents and information within their possession or control
5 or that of their contractors or agents relating to activities at the Newmark Groundwater
6 Contamination Superfund Site or to the implementation of this Consent Decree, including,
7 but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs,
8 receipts, reports, sample traffic routing, correspondence, or other documents or information
9 related to the Work. The City and the Army shall also make available to EPA and DTSC,
10 for purposes of investigation, information gathering, or testimony, its employees, agents, or
11 representatives with knowledge of relevant facts concerning the performance of the Work.
12 In connection with this litigation and the negotiation of this Consent Decree, the City and
13 the Army have provided EPA and DTSC extensive documents relating to the Site and its
14 history. The City has also provided periodic reports and other information required under
15 the Cooperative Agreement. The City and the Army shall not be required to produce or
16 make available such previously provided information or documents a second time pursuant
17 to this Paragraph. Expert witnesses were retained by the City and the Army and much
18 privileged information was assembled in the course of the litigation. Privileged
19 information need not be submitted to EPA or DTSC, but any sampling data from the Site or
20 any other data referenced in this Paragraph, not previously submitted to EPA by the City or
21 the Army, shall be submitted to EPA within 60 (sixty) days after the Effective Date, and
22 also provided to DTSC.
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123. Business Confidential and Privileged Documents.

a. The City or Army may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and DTSC under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and DTSC, or if EPA has notified the City or Army that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to the City.

b. The City or Army may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the City or Army asserts such a privilege in lieu of providing documents, the City or Army shall provide EPA and DTSC with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by the City. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree or the Cooperative Agreement shall be withheld on the grounds that they are privileged. As against EPA and each other, the City or Army also

1 shall not assert a claim of confidentiality or privilege with respect to any documents or
2 information provided in the course of negotiation of this Consent Decree.

3 124. No claim of confidentiality shall be made with respect to any data,
4 including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific,
5 chemical, or engineering data, or any other documents or information evidencing conditions
6 at or around the Site.
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8 XXV. RETENTION OF RECORDS

9 125. Until 10 (ten) years after the City's receipt of EPA's final notification
10 pursuant to Paragraph 57.d of Section XIV (Certification or Notice of Completion of the
11 Work), the City and the Army shall preserve and retain all records and documents now in
12 its possession or control or which come into its possession or control that relate in any
13 manner to the performance of the Work or liability of any person for response actions
14 conducted and to be conducted at the Site, regardless of any corporate or governmental
15 retention policy to the contrary. Until 10 (ten) years after the City's and Army's receipt of
16 EPA's final notification pursuant to Paragraph 57.d or 57.e of Section XIV (Certification or
17 Notice of Completion), the City and Army shall also instruct their contractors and agents to
18 preserve all documents, records, and information of whatever kind, nature or description
19 relating to the performance of the Work. As part of five-year reviews, EPA may, in its
20 unreviewable discretion, agree to examine any proposal to shorten the document retention
21 requirements of this Consent Decree as they relate to the performance of the Work. EPA
22 may, in its unreviewable discretion, in consultation with DTSC and the City or Army, as
23 applicable, shorten the document retention period with respect to documents that no longer
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1 serve a useful purpose in the performance of the Work or that will not be of value as
2 permanent records of EPA. With respect to the two Protective Orders relating to the Site,
3 one signed in December 1997 and the other signed in or about June 1999, and both attached
4 as Appendix J to this Consent Decree, the Parties agree that the terms and conditions of the
5 aforementioned Protective Orders relating to document retention are hereby superseded
6 such that the conditions for document retention as embodied in this Consent Decree shall
7 take precedence over the terms and conditions mentioned in the Protective Orders.
8

9 Furthermore, the Parties agree that although the June 1999 Protective Order places the
10 burden of control of the City's documents on the City's attorneys, the City's attorneys may
11 transfer the City's documents (collected pursuant to either the 1997 or the 1999 Protective
12 Order) to the City for retention upon the Effective Date of this Consent Decree, and none of
13 the Parties will contest this action.
14

15 126. The United States acknowledges that each Settling Federal Agency is
16 subject to all applicable Federal record retention laws, regulations, and policies, including
17 Army Regulation 25-400-2, Appendix B, FN: 27-40e.
18

19 127. At the conclusion of the document retention period in Paragraph 126, the
20 City and the Army shall notify the EPA at least 90 (ninety) days prior to the destruction of
21 any such records or documents, and, upon request by the EPA, the City or the Army shall
22 deliver any such records or documents to EPA. The City may assert that certain
23 documents, records and other information are privileged under the attorney-client privilege
24 or any other privilege recognized by federal law. If the City asserts such a privilege, the
25 City shall provide EPA with the following: (1) the title of the document, record, or
26
27
28

1 information; (2) the date of the document, record, or information; (3) the name and title of
2 the author of the document, record, or information; (4) the name and title of each addressee
3 and recipient; (5) a description of the subject of the document, record, or information; and
4 (6) the privilege asserted by the City. However, no documents, reports or other information
5 created or generated pursuant to the requirements of the Consent Decree shall be withheld
6 on the grounds that they are privileged.
7

8 128. The City, the Army and DTSC have exchanged extensive documents and
9 information related to allegations of liability at this Site. The City, DTSC and Army certify
10 that, to the best of their knowledge and belief, after thorough inquiry, they have complied in
11 good faith with their discovery obligations under the applicable rules, and have complied in
12 good faith with any EPA requests for information pursuant to Sections 104(e) and 122(e) of
13 CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C.
14 § 6927, and did not knowingly alter, mutilate, discard, destroy or otherwise dispose of any
15 records, documents or other information responsive to such discovery or information
16 requests or otherwise relating to potential liability regarding the Site.
17

18 XXVI. NOTICES AND SUBMISSIONS

19
20 129. Whenever, under the terms of this Consent Decree, written notice is required
21 to be given or a report or other document is required to be sent by one Party to another, it
22 shall be sent to the individuals at the addresses specified below, unless those individuals or
23 their successors give notice of a change to the other Parties in writing. All notices and
24 submissions shall be considered effective upon receipt, unless otherwise provided. Written
25 notice as specified herein shall constitute complete satisfaction of any written notice
26
27
28

1 requirement of the Consent Decree with respect to the United States, EPA, DTSC and the
2 City.

3 As to the United States:

4 Chief, Environmental Enforcement Section
5 Environment and Natural Resources Division
6 U.S. Department of Justice
7 P.O. Box 7611
8 Washington, D.C. 20044-7611
9 Re: DJ # 90-11-3-06902 /1

10 Chief, Environmental Defense Section
11 Environment and Natural Resources Division
12 U.S. Department of Justice
13 P.O. Box 23986
14 Washington, DC 20026-3986
15 Re: DJ 90-11-6-69

16 Office of the United States Attorney
17 Chief, Civil Division
18 Room 7516 Federal Building
19 300 North Los Angeles Street
20 Los Angeles, CA 90012

21 Director, Superfund Division
22 U.S. Environmental Protection Agency
23 Region 9
24 75 Hawthorne Street, SFD
25 San Francisco, CA 94105

26 As to EPA:

27 Dr. Kim Hoang
28 EPA Project Coordinator -- Newmark Site
United States Environmental Protection Agency
Region 9
75 Hawthorne Street, SFD-7-4
San Francisco, CA 94105

29 As to the Regional Financial Management Officer:

30 Joseph Schmidt
31 United States Environmental Protection Agency
32 Region 9
33 75 Hawthorne Street, PMD-5

San Francisco, CA 94105

As to DTSC:

Thomas Cota
Chief, Southern California Cleanup Operations
Branch, Cypress Office
5796 Corporate Avenue
Cypress, CA 90630

Dr. Yasser Aref
Department of Toxic Substances Control
Project Manager
5796 Corporate Avenue
Cypress, CA 90630

Ann Rushton
Deputy Attorney General
Environment Section
California Department of Justice
300 South Spring Street
Los Angeles, CA 90013

As to the City:

Stacy Aldstadt
Deputy General Manager
City of San Bernardino Municipal Water Dept.
300 North D Street
San Bernardino, CA 92418 [overnight delivery]
P.O. Box 710
San Bernardino, CA 92402 [U.S. Mail]

XXVII. EFFECTIVE DATE

130. The effective date of this Consent Decree shall be the date upon which this
Consent Decree is entered by the Court, except as otherwise provided herein.

XXVIII. RETENTION OF JURISDICTION

131. This Court retains jurisdiction over both the subject matter of this Consent
Decree and the Parties for the duration of the performance of the terms and provisions of

1 this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at
2 any time for such further order, direction, and relief as may be necessary or appropriate for
3 the construction or modification of this Consent Decree, or to effectuate or enforce
4 compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute
5 Resolution) hereof. However, nothing in this Consent Decree shall prevent EPA from
6 taking any action in accordance with the National Contingency Plan.
7

8 XXIX. APPENDICES

9 132. The following appendices are attached to and incorporated into this Consent
10 Decree:

11 "Appendix A" is the Newmark ROD.

12 "Appendix B" is the Muscoy ROD.

13 "Appendix C" is the description and/or map of the Site.

14 "Appendix D" is the SOW.

15 "Appendix E" is the proposed list of planned City treatment plants and transmission
16 systems to expand the City's potable water delivery capacity.

17 "Appendix F" is the draft easement described in Section IX (Access/Institutional
18 Controls).

19 "Appendix G" is a draft of the San Bernardino Pollution Legal Liability Clean-up
20 Cost Cap Insurance Policy selected by the City for the investment and/or retention of the
21 O&M Escrow, Construction Escrow and any other funds disbursed to the City for the
22 performance of the Work or other items funded by this Consent Decree.
23

24 "Appendix H" is the draft ordinance for the Permitting Program described in
25

1 Section IX (Access and Institutional Controls).

2 "Appendix F" is the ESD.

3 "Appendix J" consists of the two protective orders described in Paragraph 125.

4 XXX. COMMUNITY RELATIONS

5 133. The City shall propose to EPA its participation in the community relations
6 plan that has been developed by EPA. EPA will determine the appropriate role for the City
7 under the plan. The City shall also cooperate with EPA and DTSC in providing
8 information regarding the Work to the public. As requested by EPA or DTSC, the City
9 shall participate in the preparation of such information for dissemination to the public and
10 in public meetings which may be held or sponsored by EPA or DTSC to explain activities
11 at or relating to the Site.
12

13 XXXI. MODIFICATION

14 134. Schedules specified in this Consent Decree for completion of the Work may
15 be modified by agreement of the Lead Oversight Agency, with reasonable opportunity to
16 comment by the Support Agency, and the Parties. All such modifications shall be made in
17 writing.
18

19 135. Except as provided in Paragraph 17 (Modification of the SOW or Related
20 Work Plans), no modifications shall be made to this Consent Decree and no material
21 modifications shall be made to the SOW without written notification to and written
22 approval of the United States, DTSC, the City and the Court. Such modifications shall be
23 effective upon their approval by the Court. Modifications to the SOW that do not
24 materially alter that document may be made by written agreement between the Lead
25
26
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28

1 Oversight Agency and the City, with the concurrence of the Support Oversight Agency.
2 Prior to providing their approval to any such modification, EPA and DTSC will provide
3 each other with a reasonable opportunity to review and comment on the proposed
4 modification.

5
6 136. Nothing in this Consent Decree shall be deemed to alter the Court's power to
7 enforce, supervise or approve modifications to this Consent Decree.

8 137. Nothing in this Consent Decree shall be deemed to limit EPA's authority to
9 adopt additional Explanations of Significant Differences, to amend the RODs, to issue
10 additional RODs for the Newmark Groundwater Contamination Superfund Site, or to take
11 any other action consistent with the NCP.

12
13 XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

14 138. This Consent Decree shall be lodged with the Court for a period of not less
15 than 30 (thirty) days for public notice and comment in accordance with Section 122(d)(2)
16 of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the
17 right to withdraw or withhold its consent if the comments regarding the Consent Decree
18 disclose facts or considerations which indicate that the Consent Decree is inappropriate,
19 improper, or inadequate. The other Parties consent to the entry of this Consent Decree
20 without further notice.

21
22 139. If for any reason the Court should decline to approve this Consent Decree in
23 the form presented, this agreement is voidable at the sole discretion of any Party and the
24 terms of the agreement may not be used as evidence in any litigation among any of the
25 Parties.
26
27
28

1 XXXIII. SIGNATORIES/SERVICE

2 140. Each undersigned representative of the City, the Assistant Attorney General
3 for the Environment and Natural Resources Division of the Department of Justice, and the
4 Deputy Attorney General for the California Department of Justice, certifies that he or she is
5 fully authorized to enter into the terms and conditions of this Consent Decree and to
6 execute and legally bind such Party to this document.
7

8 141. The City and State each hereby agree not to oppose entry of this Consent
9 Decree by this Court or to challenge any provision of this Consent Decree unless the United
10 States has notified the other Parties to this Consent Decree in writing that it no longer
11 supports entry of the Consent Decree.
12

13 142. The City and State shall identify, on the attached signature page, the name,
14 address and telephone number of an agent who is authorized to accept service of process by
15 mail on behalf of that Party with respect to all matters arising under or relating to this
16 Consent Decree. The City hereby agrees to accept service in that manner and to waive the
17 formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and
18 any applicable local rules of this Court, including, but not limited to, service of a summons.
19

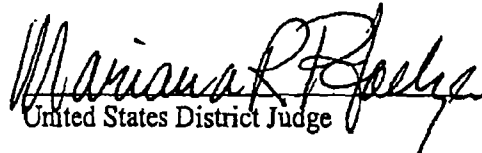
20 XXXIV. FINAL JUDGMENT

21 143. Upon approval and entry of this Consent Decree by the Court, this Consent
22 Decree shall constitute a final judgment between and among the United States, DTSC and
23 the City. The Court finds that there is no just reason for delay and therefore enters this
24 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.
25

1 the City. The Court finds that there is no just reason for delay and therefore enters this
2 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SCANNED

3
4 SO ORDERED THIS 21 DAY OF March 2005.
5

6
7 
8 United States District Judge
9

1 THE UNDERSIGNED PARTY enters into this Consent Decree relating to
2 the Newmark Groundwater Contamination Superfund Site.

3
4 **FOR THE UNITED STATES OF**
5 **AMERICA**

6 8.5.04
7 Date

Tom Sansonetti
Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

11
12 8/5/04
13 Date

-5- by Martin F. McDermott
Cynthia S. Huber
Senior Attorney
General Litigation Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663
(202) 514-5273

19
20 8/5/2004
21 Date

Martin F. McDermott
Martin McDermott
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-4122

24
25
26
27
28
Consent Decree

THE UNDERSIGNED PARTY enters into this Consent Decree relating to the Newmark Groundwater Contamination Superfund Site.

8-9-04
Date

8/9/04
Date

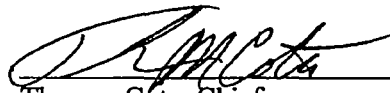
Keith Takata
Keith Takata
Director, Superfund Division, Region 9
U.S. Environmental Protection Agency
75 Hawthorne St., SFD-1
San Francisco, CA 94105

Marie M. Rongone
Marie M. Rongone
Senior Counsel
U.S. Environmental Protection Agency
Region 9
75 Hawthorne St., ORC-3
San Francisco, CA 94105
(415) 972-3891


THE UNDERSIGNED PARTY enters into this Consent Decree relating to the Newmark Groundwater Contamination Superfund Site.

**FOR THE DEPARTMENT OF TOXIC
SUBSTANCES CONTROL**

7/2/04
Date


Thomas Cota, Chief
Southern California Cleanup Operations Branch
Cypress Office
5796 Corporate Avenue
Cypress, CA 90630

July 21, 2004
Date


Ann Rushton
Deputy Attorney General
Environment Section
California Department of Justice
300 South Spring Street
Los Angeles, CA 90013
(213) 897- 2608

THE UNDERSIGNED PARTY enters into this Consent Decree relating to the Newmark Groundwater Contamination Superfund Site.

FOR THE CITY OF SAN BERNARDINO ¹

As of

June 17, 2004

Date

Signature: 

Name (print):

Title:

Address:

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Signature: -S-

Address:

Name (print):

Title: Attorney Gresham, Savage, Nolan & Tilden

Address: 3750 University Ave., Suite 250
Riverside CA
92501

Ph. Number:

951-684-2171

¹ EPA is requesting that the City provide this information so that the decree can be completed.

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2004, a true and accurate copy of the foregoing Notice of Lodging of Consent Decree was served on the following counsel:

Russell V. Randle
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037-1350
202-457-5282

By:

☒ Federal Express
☐ First Class U.S. Mail
☐ Hand Delivery

Thomas N. Jacobson
Gresham, Savage, Nolan & Tilden
3750 University Ave.
Suite 250
Riverside, CA 92501
951-684-2171

By:

☒ Federal Express
☐ First Class U.S. Mail
☐ Hand Delivery

Ann Rushton
Deputy Attorney General
State of California
Department of Justice
300 South Spring St.
Los Angeles, CA 90013-1204
213-897-2608

By:

☒ Federal Express
☐ First Class U.S. Mail
☐ Hand Delivery


Martin F. McDermott

List of Appendices to the Consent Decree

Appendix A – Newmark ROD (copy included)

Appendix B – Muscoy ROD (copy included)

Appendix C – description and/or map of the Site – (copy included)

Appendix D – Statement of Work (copy included)

Appendix E – proposed list of planned City treatment plants and transmission systems to expand the City's potable water delivery capacity (copy included)

Appendix F – draft easement described in Section IX (Access/Institutional Controls) (copy included)

Appendix G – draft of the San Bernardino Pollution Legal Liability Clean-up Cost Cap Insurance Policy selected by the City for the investment and/or retention of the O&M Escrow, Construction Escrow and any other funds disbursed to the City for the performance of the Work or other items funded by this Consent Decree (currently being negotiated with AIG and the City; document to be provided by City)

Appendix H – draft ordinance for the Permitting Program described in Section IX (Access and Institutional Controls) (copy included)

Appendix I – Explanation of Significant Differences (not included; has not yet been signed by EPA)

Appendix J – protective orders described in Paragraph 125 (copies will be provided by City)

A